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ABSTRACT

This publication reviews the history of women and girls in athletics, assesses the current status of female participation in high school and college competitive athletics, and summarizes recent policy interpretations by the Department of Health, Education, and Welfare (DHEW) of Title IX of the Education Amendments of 1972. The historical review focuses on American attitudes toward female physicality from the Victorian era to the present. Current obstacles to female participation in sports are identified as sex stereotyping of athletics as unfeminine, the idea that females should not engage in strenuous activity, and discrimination in the allocation of resources for sports. The role of Title IX (which prohibits sex discrimination in Federally-assisted education programs) in ameliorating discrimination in athletics is explained. Changes in female participation in competitive athletics since 1970 are described and related to the implementation of Title IX. Participation figures, by sex, are presented separately for high schools, two year colleges, and four year colleges, and are broken down individually for football, baseball/softball, basketball, tennis, and track. Also described are college budget allocations for men's and women's intercollegiate sports. Appended to the report are statistical tables and discussions and regulations concerning DHEW's jurisdiction under Title IX. (GC)

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More Hurdles to Clear

Women and Girls in Competitive Athletics

United States Commission
on Civil Rights

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PREFACE

Participation in athletics has long been viewed as an integral part of the educational process in American high schools and colleges. The benefits of athletic participation are numerous. Participation in athletics promotes good health and helps develop teamwork and cooperation as well as a competitive spirit. Athletics are important even for students who do not actively participate; spectator sports provide entertainment for students and the community alike, and are an important factor in developing and maintaining school spirit.

Despite the importance of athletics, women and girls were not encouraged to participate until recently. As data presented in chapter 3 show, in 1966–67 (the earliest year for which nationwide data are available), only about 16,000 women participated in intercollegiate athletics in this Nation compared to about 154,000 men. Ten years later, 64,375 women and 170,304 men participated in intercollegiate athletics. Similar increases have occurred in interscholastic athletics.

Although many factors have undoubtedly operated to influence women's increased athletic participation, one that has apparently had a major effect is Title IX of the Education Amendments of 1972. Title IX prohibits discrimination based on sex in educational institutions receiving Federal financial assistance,[1] and applies to athletic programs as well as to other educational programs. In accordance with its responsibilities to serve as a national clearinghouse for information regarding civil rights, the Commission has reviewed the history of women and girls in athletics, assessed the current status of women and girls in athletics, and summarized the most recent policy interpretation of Title IX by the Department of Health, Education, and Welfare.

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[1] For a discussion of legal issues related to Title IX, see appendix B.1.

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Chapter 1

History of Women and Girls in Athletics

The elimination of sex discrimination in American high school and college sports has become one of the Federal Government's goals as a result of the passage of Title IX of the Education Amendments of 1972. Sport has become a major social institution in America, but, as has been true with many other social institutions, women have not taken part on an equal basis with men.

The history of American women in sports begins in the mid-19th century.[1] Although girls and women have participated in sports ever since, it was not until recently that they were encouraged to do so. In the beginning they were thought too frail and weak for physical exercise; some years later, in the first quarter of this century, the enthusiasm of college women for team sports and competition was considered dangerous and unwomanly; more recently, the major obstacle to women's and girls' full participation in athletics in educational institutions has been the argument that it would cost too much.

Although record numbers of women and girls are in college and high school sports programs, their participation rates trail far behind those of men and boys, and the monies that are allotted to their programs are disproportionately small. To understand some of the forces that have operated—and continue to operate—to deny women and girls the opportunity to participate fully in sports, it is informative to begin with the Victorian era when the female sex was considered too weak and fragile to engage in sports or physical activity at all.

Victorian Era

The ideal woman in the Victorian era was weak, fragile, and passive,[2] a person "on a pedestal somewhere above the realities of life."[3] Fashion designers, clergymen, physicians, and journalists joined in creating an image of femininity that was characterized by delicacy and even by poor health.[4] Clothing was exceptionally restrictive, with tightly laced corsets, bustles, hoops, and long trailing skirts. It is not surprising that women were easily prone to fainting. Betty Spears, a sports historian from Wellesley College, has noted, "Women were expected to remain indoors, and pursue such feminine pastimes as embroidery and painting on glass."[5] Obviously, this ideal was not applied to working class women or to minority women. As Betty Spears noted, "This upper-class image ignored sturdy farm girls, the workers who toiled long hours in the factories,. . .and the average woman who kept house and raised a family."[6]

Although it was generally believed that most physical activity was too strenuous for women, both sexes occasionally participated together in such games and sports as archery, bowling, croquet, golf, and tennis. Since the skill level and effort were not high for either sex, these sports provided pleasant recreation for men and women.[7]

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[1] Ellen W. Gerber, Jan Felshin, Pearl Berlin, and Waneen Wyrick, *The American Woman in Sport* (Reading, Mass.: Addison-Wesley Publishing Company, Inc., 1974), p. 4.

[2] Betty Spears, "The Emergence of Women in Sport," *Women's Athletics: Coping with Controversy* (Washington, D.C.: AAHPER Publications, 1974), p. 27.

[3] Gerber, et al., *The American Woman in Sport*, p. 10.

[4] Spears, "The Emergence of Women in Sports," p. 27.

[5] Ibid.

[6] Ibid.

[7] Gerber, et al., *The American Woman in Sport*, p. 4.

During the 1860s, women's colleges played a special role in developing women's sports.[8] There had been great resistance towards the idea of providing higher education for women, because it was believed that they were mentally and physically inferior to men and therefore unable to attend class on a regular basis. The founders of women's colleges encouraged young women to participate in vigorous exercise, on the theory that women could do college work only if it was balanced by physical activity. They also wanted to show the public that young women could engage in college work equal to that of young men.[9] At Vassar, for instance, physical activities included gymnastic exercises[10] as well as bowling, horseback riding, swimming, flower gardening, and ice skating. Because these activities proved to be a success, soon other women's colleges followed Vassar's lead.[11]

By the 1890s sports were recognized by both educators and students as producing the same physical results as gymnastic exercises,[12] and the team sports of basketball, volleyball, and field hockey were introduced. As women began to enjoy the excitement of these new team sports, their interest in gymnastic exercises declined further, and by the end of the decade, team sports played a prominent role in college physical education programs.[13]

Women's and Girl's Athletics Since 1900

As women and girls began to participate in large numbers in competitive team sports, some physical educators disapproved because competition was not considered womanly.[14] After basketball became the most popular team sport for women and girls across the Nation, many physical educators became convinced that it would be injurious to the health of women if they continued to engage in competitive athletics. Their major worry was that women and girls would be pressured into playing during their menstrual period.[15] In 1924 one prominent physical educator reflected the opinion of her colleagues by saying, "They would be apt to get more physical straining than physical training."[16]

Physical educators were convinced that rough physical contact in competitive sports was more dangerous for women and girls than for boys and men.[17] Competitive athletics, although dangerous for men, were justifiable because they could develop manly strength. They could find no comparable justification for women's athletics because they did not consider the development of strength appropriate for women.[18]

Many physical educators also wanted to guard women's programs at high schools and colleges from the professionalization of men's intercollegiate athletic programs. Women's athletic programs, they said, should focus more on intramural competition such as field days, rally days, and class days, where the competition was not as vigorous.[19] Not wishing to follow the men's pattern of athletics, female physical educators created a new athletic philosophy for women based on securing "the greatest good to the greatest number." This philosophy has served as the underlying basis for women's athletic programs for the better part of this century.[20] They were also alarmed by the fact that few women or girls received health examinations,[21] that women athletes were wearing "questionable uniforms," and that they were allowed to travel unchaperoned.[22] Since many of these physical educators had worked hard over the years for high standards of conduct and sportsmanship for women, they began to fear that the woman athlete would be exploited.[23]

The solution to these problems appeared to be firm national regulation of women's athletics. Several women's athletic organizations were soon formed, but it was not long before the policies they developed resulted in decreased competitive opportunities for women and girls.

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[8] Spears, "The Emergence of Women in Sport," pp. 27–28. At Oberlin, the first coeducational college in the United States, both women and men participated in physical activity. Initially, activities for women included gardening as well as various kinds of household work, but beginning in the 1850s sports replaced labor as the required physical component in the education of men and women. Interestingly, the athletic program at Oberlin was first developed by a woman, Delphine Hanna. Frederick D. Shults, "Oberlin College: Molder of Four Great Men," *Quest*, Monograph XI, December 1968, p. 72

[9] Betty Spears, "Prologue: The Myth," *Women and Sport from Myth to Reality*, ed. Carol A. Oglesby (Philadelphia, Pa.: Lea and Febiger, 1978), p. 9.

[10] Gymnastic exercises are the same as physical exercises or calisthenics.

[11] Spears, "Prologue: The Myth," p. 9.

[12] Ibid.

[13] Ibid., p. 10.

[14] Gerber et al., *The American Woman in Sport*, p. 68.

[15] Ibid., p. 16.

[16] Mabel Lee, "The Case For and Against Intercollegiate Athletics for Women and the Situation as it Stands To-Day," *American Physical Education Review*, vol. 29, January 1924, p. 13.

[17] Gerber et al., *The American Woman in Sport*, p. 16.

[18] Ibid., p. 69.

[19] Ibid.

[20] Spears, "Prologue: The Myth," p. 11.

[21] Margaret A. Coffey, "The Modern Sportswoman," *Journal of Health, Physical Education, and Recreation*, vol. 36, February 1965, p. 39.

[22] Spears, "Prologue: The Myth," p. 11.

[23] Ibid.

In 1917 the Athletic Conference of American College Women was formed at the University of Wisconsin,[24] but in 1920 the Association of Directors of Physical Education for College Women denounced women's intercollegiate athletics. Concerned about "commercialization and professionalization," they preferred "a broad program of activities" to specialized competition.[25]

In 1923, a Woman's Division of the National Amateur Athletics Federation was formed. It developed a philosophy—sometimes referred to as the "creed"—which "stressed sports opportunities for all girls, protection from exploitation, enjoyment of sports, female leadership, [and] medical examinations."[26]

The purpose of the creed was to promote athletic programs for all women and girls regardless of skill, instead of focusing on highly competitive athletics for only a few. Although the promoters of this philosophy assumed that their resolution would foster healthy athletic competition for all women and girls, it was interpreted as opposing competition.[27] Soon female competitive athletics began to decrease. The percentage of colleges sponsoring varsity competition for women throughout the country dropped from 22 percent in 1923 to 12 percent in 1931.[28] In place of competition, play days and sports days were organized. This philosophy of athletics for women and girls continued into the early 1960s.

Although there were few competitive athletics for girls and women at educational institutions during the depression and Second World War, by the end of the war, women were eager to participate. Once again, however, the idea that competition was "unladylike" constituted an obstacle.

Sports such as swimming, gymnastics, riding, skiing, and tennis were considered acceptable for women participants, but softball, basketball, and track were considered "unladylike," and the femininity of women who participated in them was questioned.[29] "The greatest good to the greatest number" slogan was revised to "a sport for every girl and every girl in a sport." This philosophy resulted in denying competition to the highly skilled woman athlete.[30]

While many women were still concerned about their "femininity" or were participating in recreation programs designed for all women but competitive for none, a few schools were interested in winning. Among the latter were two predominantly black colleges. Female track stars from Tuskegee Institute won 13 outdoor and 4 indoor Amateur Athletic Union (AAU) championships between 1936 and 1951. Tennessee State University won 25 AAU championships beginning in 1955.[31] These two colleges were in large part responsible for the United States' fine showing in international track competition during these years. Tuskegee Institute has placed 6 women on Olympic track teams. Tennessee State has placed 29 women on Olympic teams, and they have won 11 gold, 4 silver, and 4 bronze medals. The two most famous Tennessee Tigerbelles are Wilma Rudolf who won 3 gold medals in the 1960 Olympics and Wyomia Tyus who is the only person–male or female–to win a gold medal in the 100 meter race in two successive Olympiads, 1964 and 1968.[32]

By the 1960s, competitive athletics for girls and women were looked upon more favorably than in the 1930s. The Division for Girls and Women's Sports (DGWS)[33] decided that it had been discriminating against the highly-skilled female athlete by forcing her out of the educational environment to gain competitive athletic experiences[34] and formed the Commission on Intercollegiate Athletics for Women, presently known as the Association for Intercollegiate Athletics for Women (AIAW), to provide "a framework for appropriate intercollegiate athletic opportunities for women."[35]

Current Obstacles to Full Participation

In 1972 Congress passed Title IX of the Education Amendments of 1972, which states, "No person in the United States shall on the basis of sex be

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[24] Richard A. Swanson, "From Glide to Stride: Significant Events in a Century of American Women's Sports," *Women's Athletics: Coping with Controversy*, pp. 48-49.

[25] Spears, "Prologue: The Myth," p. 11.

[26] Ibid., p. 12.

[27] Gerber, et al., *The American Woman in Sport*, p. 73.

[28] Mabel Lee, "The Case For and Against Intercollegiate Athletics for Women and the Situation Since 1923," *Research Quarterly*, vol. 11, May 1931, p. 122.

[29] Spears, "Prologue: The Myth," p. 13.

[30] Ibid.

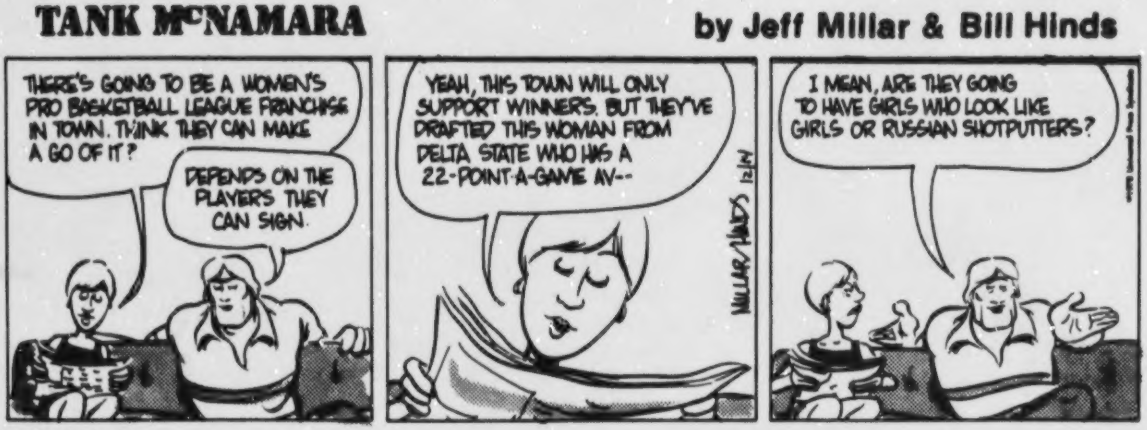
[31] Gerber et al., *The American Woman in Sport*, p. 121.

[32] Ibid., pp. 133 and 302.

[33] DGWS is a division of the American Association for Health, Physical Education and Recreation.

[34] Lucille Magnusson, "The Development of Programs," *Women's Athletics: Coping with Controversy*, p. 56.

[35] Spears, "Prologue: The Myth," p.14.


TANK McNAMARA
by Jeff Millar & Bill Hinds
THERE'S GOING TO BE A WOMEN'S PRO BASKETBALL LEAGUE FRANCHISE IN TOWN. THINK THEY CAN MAKE A GO OF IT?
DEPENDS ON THE PLAYERS THEY CAN SIGN.
YEAH, THIS TOWN WILL ONLY SUPPORT WINNERS. BUT THEY'VE DRAFTED THIS WOMAN FROM DELTA STATE WHO HAS A 22-POINT-A-GAME AV--
MILLAR/HINDS
I MEAN, ARE THEY GOING TO HAVE GIRLS WHO LOOK LIKE GIRLS OR RUSSIAN SHOTPUTTERS?

Tank McNamara
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excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[36] On July 21, 1975, HEW adopted a regulation to implement Title IX,[37] and in September 1975, HEW transmitted a memorandum to chief State school officers, superintendents of local educational agencies, and college and university presidents explaining how Title IX applies to athletic programs.[38] Women and girls hoped that Title IX would quickly lead to increased opportunities.

Although physical educators have accepted the idea of competitive athletics for women and girls, and more women and girls are participating in competitive athletics than ever before, obstacles continue to exist. One major barrier that women athletes must face is sex stereotyping of sports, which apparently has grown out of the attitude that it is unfeminine for women to participate in them. A number of myths surround this attitude and its various manifestations—people don't want to watch women play competitively, sports masculinize women, women cannot excel in sports for physiological reasons, women are not really interested in sports. The facts belie the myths.

Spectator interest has already been demonstrated with respect to women's and girls' sports. In the State of Iowa, for example, girls' high school athletics, particularly basketball, are followed as eagerly as boys' athletics. The 58th Annual State Girls Basketball Championship held in Des Moines in March 1977 attracted crowds totalling more than 100,000 and was televised over a nine-State area.[39]

Television has played a major role in generating spectator interest in sports, but until 1960 it largely ignored women's sports. Television first sparked real interest in women's sports with its coverage of the 1960 Rome Olympics. After that women's and girls' gymnastics and swimming competitions began to be featured on such programs as "Wide World of Sports."[40] Now women's sports are often seen on television and can be expected to result in increased spectator interest.

A second barrier to full participation by females in athletics is the idea that sports are a masculine activity. During the early childhood years, boys and girls are equally matched physically, and they often play together in rugged games and activities. As they approach puberty, however, such girls are frequently labeled "tomboys," and are led to believe that vigorous activity like climbing trees and playing ball is only for boys. By the age of 12, then, many girls have already given up the idea of playing in sports because of the negative connotations associated with being a "tomboy." Dr. Jack Wilmore, professor and head of the department of physical education and athletics at the University of Arizona, has argued that the decision to give up sports in favor of "a sedentary lifestyle" results in the deterio-

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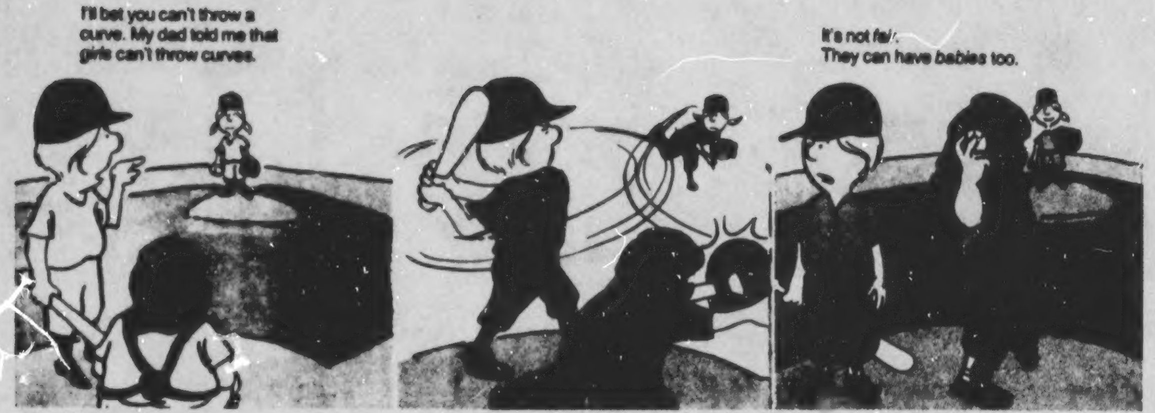
[36] 20 U.S. §1681 (1978).

[37] 45 C.F.R. §86.41 (1978).

[38] U.S., Department of Health, Education, and Welfare, Office for Civil Rights, "Elimination of Sex Discrimination in Athletic Programs," memorandum to Chief State School Officers, Superintendents of Local Education Agencies, and College and University Presidents, September 1975.

[39] "Hooping It Up Big," *Time*, Mar. 28, 1977, p. 84.

[40] Swanson, "From Glide to Stride," pp. 51-52.


I'll bet you can't throw a curve. My dad told me that girls can't throw curves.
It's not fair. They can have babies too.

Tank McNamara
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ration of strength and muscular and cardiovascular endurance as well as in the accumulation of body fat.[41] An undetermined percentage of physical inequality between men and women results, Dr. Wilmore argues, from the "social or cultural restriction imposed on the female."[42] By becoming less active during their developing years, girls miss out on opportunities to increase their strength and improve their physical well-being, while their male counterparts are encouraged to remain physically active.

A variety of studies have demonstrated that female athletes are physically stronger, more muscular, and more flexible than women who are not athletes.[43] Having physical strength and flexibility, however, is not to be masculine. The adult female body contains only about half the muscle mass of the adult male body. Some of the male's greater muscle mass is due to the fact that men are taller than women, but even when size is held constant, females have only 80 percent of the strength of men.[44] In one study in which males and females undertook identical training, the males increased their muscular strength by 50 percent while the females increased theirs by only 24 percent.[45] More basic, however, is the association of strength with masculinity and weakness with femininity. The myth that sports will "masculinize" women derives from this Victorian association,and unfairly denies women robust good health.

Sports physiologists have demonstrated that women can play as actively as men, that Olympic athletes have competed and won at all stages of the menstrual cycle, and that exercise, if anything, is beneficial rather than harmful in alleviating menstrual complaints.[46] The effect of training and competition on the ease of childbirth is pronounced. A study of Olympic athletes showed that they delivered their babies 87.2 percent faster than established norms, with 50 percent fewer Caesarian sections than in normal populations.[47] Another study found that women with chronic fatigue and low back pain following pregnancy suffered primarily from the lack of physical activity dating from childhood and from poorly developed anterior abdominal musculature.[48]

The myth that girls and women are not really interested in sports appears to be supported by the low rates of participation compared with boys and men. Low participation rates, however, are more a reflection of lack of opportunity and fear of being thought "masculine" than lack of interest. Where opportunities are available and female athletes are rewarded, girls and women participate in large numbers. In Iowa, where high school girl athletes are idolized in the media and in the grandstands,[49]

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[41] Jack H. Wilmore, "Physiological Principles and Practices of the Conditioning Process," *Athletic Training and Physical Fitness* (Boston, Mass: Allyn and Bacon, Inc., 1977), p. 187.

[42] Jack H. Wilmore, "Exploding the Myth of Female Inferiority," *The Physician and Sportsmedicine*, vol. 2 (May 1974), p. 55.

[43] Gerber, et al., *The American Women in Sport*, p. 427.

[44] Ibid., p. 428.

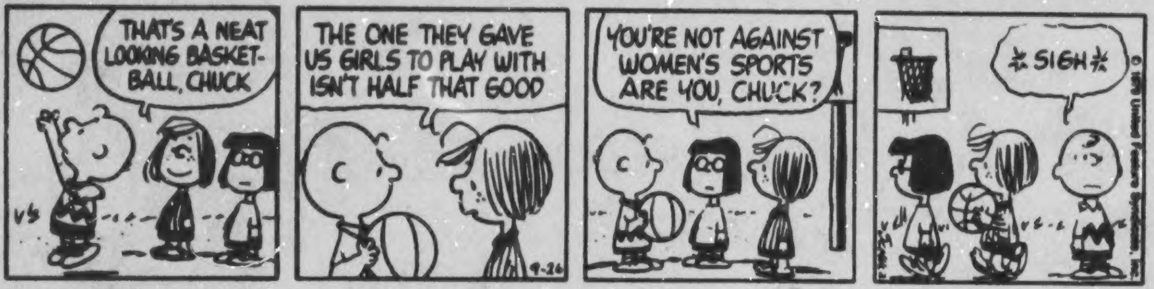
[45] N.V. Zimkin, *Physiological Basis of Physical Culture and Sports* (Moscow: Fizkultura i Sport, 1955), as cited in Gerber et al., *The American Women in Sport*, p. 428.

[46] E. S. Gendel, "Fitness and Fatigue in the Female," *Journal of Health, Physical Education, and Recreation*, vol. 42, October 1971, pp. 53–58.

[47] Gerber, *The American Woman in Sport*, p. 512.

[48] Gendel, "Fitness and Fatigue in the Female," p. 53.

[49] Jim Enright, *Only in Iowa: Where the High School Girl Athlete is Queen* (Des Moines: Iowa Girls High School Athletic Union, 1976).


THAT'S A NEAT LOOKING BASKET-BALL, CHUCK
THE ONE THEY GAVE US GIRLS TO PLAY WITH ISN'T HALF THAT GOOD
9-26
YOU'RE NOT AGAINST WOMEN'S SPORTS ARE YOU, CHUCK?
SIGH
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the percentage of athletes who are girls is higher than in any other State (48.8 percent).[50]

Women are also discouraged by discrimination in the allocation of facilities, equipment, practice schedules, and budgets. Facilities provided for women are often inferior to those provided for men. Commonly, their gymnasiums are smaller and less well-equipped.[51] In some cases, women have had to pay for their own equipment.[52] When women's teams and men's teams share facilities for practice or competition, women typically are scheduled around the men, for example, at 6:30 a.m. or during the dinner hour.[53] Boys have uniforms for each sport, while girls may have to make do with colored "pinnies" over their own gym clothes.[54]

The disproportionately low amount of money spent on female athletes compared with male athletes has become a widely used measure of discrimination or lack of equal opportunity. The results of an informal survey of colleges and high schools conducted by *womenSports* Magazine in 1974 showed that at the high school level boys' budgets, on the average, were five times larger than girls', while at the college level, men's athletic budgets were 30 times larger. In some universities the difference was 100 times as great.[55]

Although budgeting differences like these are no longer prevalent, colleges and high schools continue to spend much more for their male athletes than their female athletes. Girls and women have faced a variety of obstacles to full participation in athletics—athletics were considered unwomanly, dangerous, and too expensive. Despite these obstacles, women and girls are participating in sports in greater numbers than ever before.

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[50] See table A.1 in appendix A.

[51] American Friends Service Committee, "Almost as Fairly: The First Year of Title IX Implementation in Six Southern States," 1977, p. 46.

[52] Ibid., p. 49.

[53] Ibid., p. 46.

[54] Ibid., p. 53.

[55] "Revolution in Women's Sports," *womenSports*, September 1974, p. 37.

Chapter 2

Title IX and the Implementing Regulation

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally-assisted education programs:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[1]

Although Title IX was passed in 1972, it was not until 1975 that the Department of Health, Education, and Welfare (HEW) issued a regulation implementing this legislation.[2]

Although ultimately unsuccessful, efforts were made in Congress to amend Title IX largely to exclude intercollegiate athletics from its provisions. Senator John Tower (R–Texas) introduced an amendment to the Education Amendments of 1974 to exempt from coverage under Title IX any sports that do or may provide gross receipts,[3] noting that the purpose of his amendment was to "preserve the revenue base of intercollegiate activities [so that] it will provide the resources for expanding women's activities in intercollegiate sports."[4]

The Tower amendment was replaced in conferenceby the Javits amendment, which provided only that HEW "prepare and publish regulations. . .that. . .include with respect to intercollegiate athletic activities reasonable provisions concerning the nature of particular sports."[5] The Javits language makes clear that the conference committee, and later the Congress by its approval, found the amendment exempting revenue-producing sports unacceptable and rejected it. The intent of the Congress was that Title IX was to apply to all athletic programs operated by federally-assisted educational institutions. Accordingly, HEW issued a final implementing regulation on May 27, 1975.[6] Congressional hearings were held in June,[7] and, since Congress took no action requiring changes in the regulation, it went into effect on July 21, 1975.

The Title IX regulation requires that physical education classes at all recipient institutions—elementary, secondary, and post secondary schools—be offered on a coeducational basis.[8] These regulations took effect in July 1976 for elementary schools and in July 1978 for secondary schools and colleges.[9]

The Title IX regulation on competitive athletics is in four sections. Section (a) provides for nondiscrimination in athletics:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient.[10]

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[1] 20. U.S.C. §1681 (1978).

[2] 40 Fed. Reg. 24137 (June 4, 1975).

[3] S.1539, 93d Cong., 2d. sess., 120 Cong. Rec. 15322 (1974).

[4] *Id.* at 15323.

[5] *Id.* at 24592.

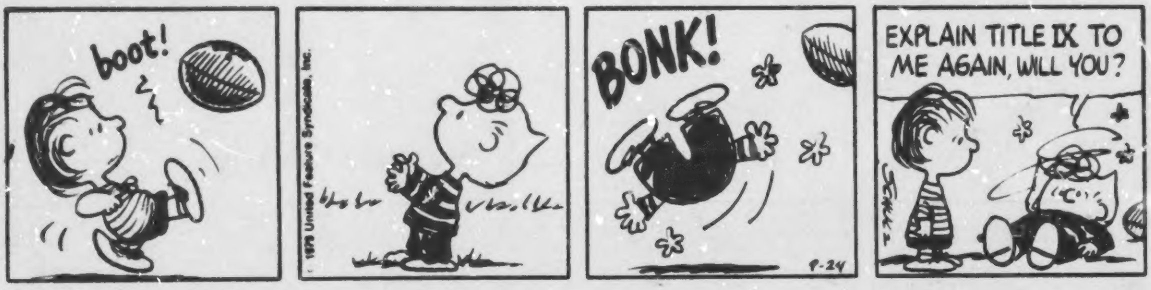
[6] 45 C.F.R. §86.34 (1975).

[7] Hearings on Review of the Title IX Regulation Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975).

[8] 45 C.F.R. §86.34 (1978).

[9] 45 C.F.R. §86.34(a) (1978).

[10] 45 C.F.R. §86.41(a) (1978).


boot!
© 1979 United Feature Syndicate, Inc.
BONK!
9-24
EXPLAIN TITLE IX TO ME AGAIN, WILL YOU?
SCHULZ

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Section (b) allows—but does not require—recipient institutions to sponsor separate teams for members of each sex. In accordance with the requirements of the Javits amendment, the implementing regulation takes into account "the nature of particular sports." Although the regulation requires that teams be open to males and females, exceptions are permitted. First, teams for which athletes are selected on the basis of competitive skill—that is, interscholastic and intercollegiate teams—are not required to be open to members of both sexes. Second, there is no requirement that any teams in contact sports be open to members of both sexes. Contact sports include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."[11] Although interscholastic and intercollegiate teams, and all teams in contact sports, may be offered to males and females separately, institutions are required to open intramural and club teams in noncontact sports to members of both sexes.

The regulation does not require identical programs for males and females. Some sports, such as football or field hockey, may be offered only to one sex. A member of the opposite sex must be permitted to try out for the team, however, if two conditions are met: the team is not a contact sport, and opportunities for members of that sex were limited in the past. In other words, if an institution offers a noncontact sport, such as golf, only to males, and a female wishes to try out for the team, she must be permitted to do so if opportunities for females were limited in the past.[12] There is no requirement that teams in football or any other contact sport be opened to members of both sexes (even intramural or club teams); nor is there any requirement that the same sports be offered to both males and females.[13]

Section (c) sets forth institutional responsibilities under Title IX, and lists the factors HEW will consider in deciding whether males and females are receiving equal opportunity:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of game and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.[14]

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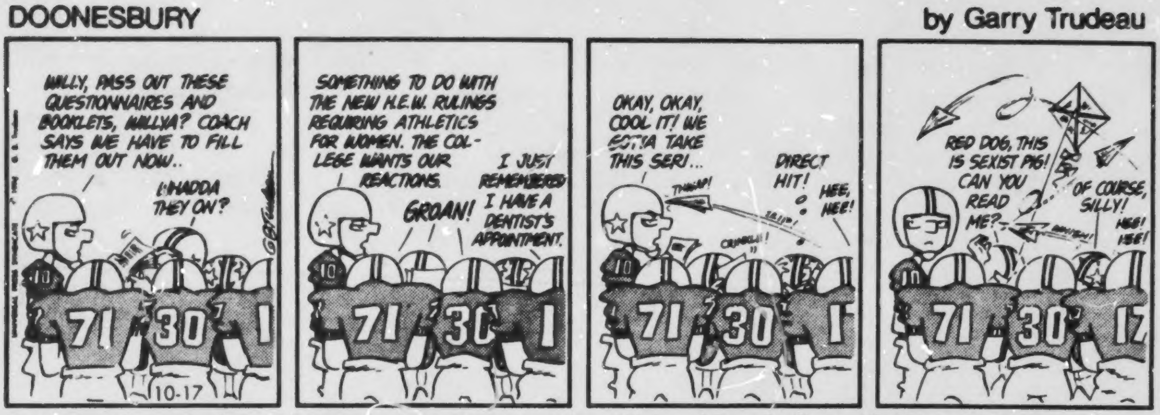
[11] 45 C.F.R. §86.41 (b) (1978).

[12] In Gomes v. Rhode Island Interscholastic League a district court ruled that a male student must be permitted to participate in volleyball, a sport offered only to females, because opportunities for males *in that sport* have been limited in the past. 469 F. Supp. 659 (D. Rhode Island 1979). Although the decision was appealed, it was dismissed as moot. *Education Daily*, Oct. 1, 1979, p. 5.

[13] Several recent court cases have challenged the section of the implementing regulation that permits institutions to prohibit females from participating in contact sports. In Yellow Springs Exempted Village School District Board of Education v. Ohio School Athletic Association, the district court ruled that the HEW regulation permitting recipients to prohibit girls from participating in contact sports violated the fifth amendment by depriving girls of their liberty without due process. 433 F. Supp. 753, 759 (S.D. Ohio 1978). Two other courts have ruled on similar issues without declaring the regulation unconstitutional. In Hoover v. Meikeljohn the court ruled that refusing a female student the opportunity to participate in contact sports denied the student's right to equal protection and violated the 14th amendment. 430 F. Supp. 164 (D. Colorado 1977). Another district court in Leffel v. Wisconsin Interscholastic Athletic Association ruled that the asserted goal of protection of girls from unreasonable risk of injury was not sufficient reason to deny them the right to participate, and likewise violated their 14th amendment right to equal protection. 444 F. Supp. 1117 (E.D. Wisconsin 1978). None of these cases has been appealed.

[14] 45 C.F.R. §86.41(c) (1978).


DOONESBURY
by Garry Trudeau
WILLY, PASS OUT THESE QUESTIONNAIRES AND BOOKLETS, WILLYA? COACH SAYS WE HAVE TO FILL THEM OUT NOW..
WHADDA THEY ON?
SOMETHING TO DO WITH THE NEW H.E.W. RULINGS REQUIRING ATHLETICS FOR WOMEN. THE COLLEGE WANTS OUR REACTIONS.
GROAN!
I JUST REMEMBERED I HAVE A DENTIST'S APPOINTMENT.
OKAY, OKAY, COOL IT! WE GOTTA TAKE THIS SERI...
THWAP!
DIRECT HIT!
HEE, HEE!
RED DOG, THIS IS SEXIST PIG! CAN YOU READ ME?
OF COURSE, SILLY!
HEE! HEE!
10-17
71
30
10

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The regulation notes that although Title IX does not require equal aggregate expenditures for male and female athletes, the Director of HEW's Office for Civil Rights may consider "failure to provide necessary funds for teams for one sex"[15] in determining whether equal opportunity has been provided.

HEW anticipated that high schools and colleges would need some time to bring their athletic programs into compliance, and in section (d) it provided a 3-year adjustment period:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.[16]

In September 1975 HEW advised college and university presidents, chief State school officers, and local school superintendents that the 3-year adjustment period allowed in the regulation was not to be a "waiting period."[17] On the contrary, HEW expected schools to take several specific actions during the first year:

> (1) Compare the requirements of the regulation addressed to nondiscrimination in athletic programs and equal opportunity in the provision of athletic scholarships with current policies and practices;
>
> (2) Determine the interests of both sexes in the sports to be offered by the institution and, where the sport is a contact sport, or where participants are selected on the basis of competition, also determine the relative abilities of members of each sex for each such sport offered, in order to decide whether to have single sex teams or teams composed of both sexes. (Abilities might be determined through try-outs or by relying upon the knowledge of athletic teaching staff, administrators and athletic conference and league representatives.)
>
> (3) Develop a plan to accommodate effectively the interests and abilities of both sexes, which plan must be fully implemented as expeditiously as possible and in no event later than July 21, 1978. Although the plan need not be submitted to the Office for Civil Rights, institutions should consider publicizing such plans so as to gain the assistance of students, faculty, etc. in complying with them.[18]

The athletics memorandum also reminded recipients that the regulation covers athletic scholarships.[19] The regulation states that opportunities to receive athletic scholarships should be "roughly proportionate"[20] to the numbers of male and female athletes.[21] The memorandum explained that if scholarships are not awarded on a proportionate basis, they must be awarded on a sex-neutral basis, such as financial need, athletic ability, or a combination of both factors. These criteria are not permissible, however, if the standards for athletic ability or financial need are "not neutral in substance or in application."[38] For instance, if ability in a particular sport were to be the criterion, and one sex were far more proficient than the other, separate norms would be required for each sex.[39]

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[15] Ibid.

[16] 45 C.F.R. §86.41(d) (1978).

[17] U.S., Department of Health, Education, and Welfare, Office for Civil Rights, "Elimination of Sex Discrimination in Athletic Programs," Memorandum to Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents, September 1975 (hereafter referred to as "Athetics Memorandum"), p. 4.

[18] Ibid., pp. 5–6.

[19] Ibid., p. 7.

[20] Ibid., p. 9.

[21] With respect to athletic scholarships, the regulation states:

> To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics. 45 C.F.R. §86.37(c).

The Title IX implementing regulation required that all educational institutions be in full compliance by July 21, 1978. Many high schools and colleges were required to make major changes in their athletic programs to accommodate the interests and abilities of female students. The following two chapters discuss the changes that have occurred in women's and girls' participation rates and budget allocations as institutions have attempted to comply with Title IX.

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[38] "Athletics Memorandum," p. 10.

[39] Ibid.

Chapter 3

Participation in High School and College Competitive Athletics

Title IX was enacted in 1972, and its implementing regulation was released in 1975. Both Title IX and the regulation have helped to focus considerable attention on women's and girls' athletic programs. As colleges and high schools have provided increased opportunity for women and girls, their participation in competitive athletics has increased markedly. This chapter describes the changes in athletic participation that have occurred in the 1970s.[1]

High Schools

Millions of high school students participate in sports, and interscholastic competitions are the foremost extracurricular activity in most high schools in the Nation. Interscholastic teams are the source of most American world class athletes and their coaches.[2] No other institution can match the magnitude of the athletic programs offered in the Nation's high schools.[3]

In each State a State athletic association coordinates and regulates interscholastic athletic competitions. All 50 States, the Canadian Provinces, and the Philippines belong to the National Federation of State High School Associations (NFSHSA). That organization establishes uniform rules for competition, which State athletic associations may voluntarily adopt, and provides services, such as guidelines for the treatment of athletic injuries.

Every 2 years the federation publishes the number of schools in each State with the particular sports they offer for boys and girls and the number of participants in those sports. This list is complete for all States except Iowa.[4] Table A.1 in appendix A provides a list of participation rates for girls and boys in all States. These biennial surveys have shown that the number of girls participating in interscholastic sports and the proportion of all athletes who are girls have increased dramatically since the 1970–71 school year. In that year, 294,015 girls and 3,666,917 boys participated in interscholastic athletics; 7.4 percent of all participants were girls, about 1 out of 13. Two years later, in the 1972–73 school year, 17.2 percent of all participants were girls; in 1974–75, 23.5 percent were girls; in 1976–77, 28.2 percent were girls; and in 1978–79, the most recent year for which data are available, 31.9 percent of all members of interscholastic teams were girls, approximately one out of every three participants.[5] The proportion who are girls has quadrupled since 1970, and the number of female athletes has increased 570.5 percent.[6] The number of male athletes increased during this period by 13.5 percent. Girls' and boys' participation rates are shown in figure 3.1.

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[1] Although Title IX applies to physical education also, this chapter discusses competitive athletics only, and does not provide information on the status of coeducational physical education programs.

[2] *The Final Report of the President's Commission on Olympic Sports, 1975–1977*, vol. II, 1977, p. 359.

[3] Ibid.

[4] Each State except Iowa has one high school association. Each sends a representative to the federation. Since 1926 Iowa has had two athletic associations, one for boys and one for girls; the boys' association belonged to NFSHSA prior to the organization of the separate association for girls. Because NFSHSA regulations permit only one voting representative per State, the Iowa Girls' High School Athletic Union is not represented, and girls' participation figures for Iowa are not published by NFSHSA. Wayne Cooley, executive secretary, Iowa Girls' High School Athletic Union, telephone interview, July 2, 1979.

[5] The total numbers of boys and girls who participated were obtained by adding the participants in each sport for all States. Students in Canada and

The dramatic growth in the number of girls in interscholastic athletics is illustrated by the increasing number of schools offering the two most widely available sports for boys and girls, basketball and outdoor track and field. Almost as many schools offered these two sports to girls as to boys in 1978–79.[7] Basketball was available to boys in 19,647 schools in 1970–71 but available to girls in only 4,856 schools. By 1978–79 basketball was available to boys in 18,752 schools and to girls in 17,167 schools. Track was available to boys in 16,383 schools in 1970–71 and to girls in 2,992 schools; by 1978–79, 16,142 schools offered track to boys, and 13,935 schools offered it to girls. Figure 3.2 shows the availability of these two sports to boys and girls in 1970–71 and 1978–79.

Despite these impressive gains, large discrepancies remain in the boys' and girls' programs. Although basketball and track have become increasingly available to girls, and are now almost equally available to both boys and girls, the number of girls in interscholastic sports lags far behind the number of boys, as shown in table 3.1. This is largely due to the fact that girls do not participate at all in two of the five most popular sports—football and wrestling. Indeed, football with its comparatively large teams has more players nationwide than either basketball or track, even though it is offered in fewer schools. Although girls are quickly achieving parity in basketball and track, they have been offered no sport that compares with the nationwide popularity of football or wrestling.

Furthermore, large discrepancies also remain in the availability of less popular sports, which are offered to boys far more frequently than they are to girls. Some differences may be attributable to traditional sex stereotyping; for instance, 578 schools offer ice hockey to boys, but none offers it to girls. Other discrepancies, however, cannot be explained in this manner. Golf is offered to boys in over three times as many schools (9,437) as to girls (2,907). Water polo is offered to boys in 397 schools but to girls in only 28 schools. There are even differences in table tennis: 99 schools offer it to boys, but only 1 offers it to girls. Of the 29 sports available on the interscholastic level, 22 are more often available to boys than to girls. Table A.2 in appendix A lists the number of sports available to boys and girls and the number of participants in 1978–79.

Title IX requires recipient institutions to accommodate the interests and abilities of members of both sexes,[8] but a comparison of the participation by girls on interscholastic teams with their participation in intramural sports suggests that the number of interscholastic teams may not be adequate, at least insofar as their interests are concerned. Intramural teams are open to all interested players regardless of prior athletic training and skill, and the proportion of girls in intramural sports is far higher than in interscholastic sports. Analysis of data gathered in 1975–76 by the National Center for Education Statistics (NCES),[9] shows that 43.9 percent of all intramural participants were girls. This is markedly higher than the percentage of interscholastic participants who were girls (28.7 percent), as shown in figure 3.3.

Evidence that high school girls are indeed interested in competitive athletics is also available from their participation in Iowa, a State with a long history of athletic competitions for girls. Statewide girls' basketball tournaments in Iowa date back to 1920,[10] and the Iowa Daily Press Association began selecting and publishing all-State teams as far back as 1946.[11] Despite the fact that Iowa offers only the

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the Philippines were not included. The figures do not include girls participating in Iowa. *Sports Participation Survey*, National Federation of State High School Associations, 1971, 1973, 1974, 1976, and 1978.

[6] Just before presstime, a revised version of the 1978–79 *Sports Participation Survey* was published, using "a more sophisticated information gathering system." The number of high schools and participants on the revised survey are lower than those previously published, because the previously published 1978–79 survey, and the earlier surveys, include some junior high schools. Because the data on the revised survey cannot be compared with the surveys for 1970–71, 1972–73, 1974–75 and 1976–77, the previously published 1978–79 survey is used here. The revised survey shows that 33.3 percent of all athletes are girls. National Federation of State High School Associations, *Handbook, 1979–80* (Kansas City, Mo.: National Federation of State High School Associations, 1979), p. 98.

[7] The number of schools offering these sports was obtained by adding the schools for all States. Schools in Canada and the Philippines were not included. Data for schools in Iowa for 1978 were supplied by the Iowa Girls' High School Athletic Union and were added to the totals. *Sports Participation Survey*, National Federation of State High School Associations, 1971 and 1978; and *Iowa Girls' High School Athletic Association News*, May 1979, p. 3.

[8] 45 C.F.R. 86.41(c)(i) (1978).

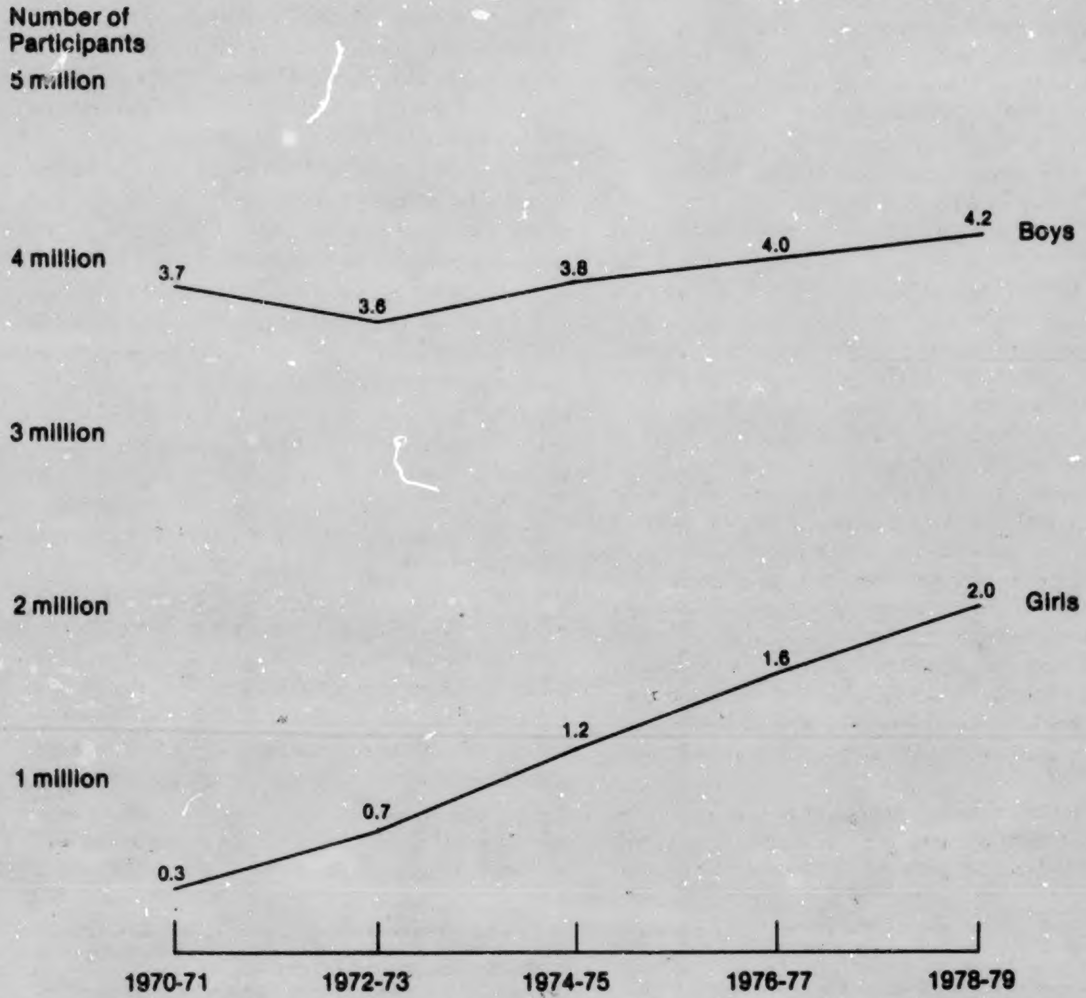
[9] National Center for Education Statistics, *Athletic Injuries and Deaths in Secondary Schools and Colleges, 1975–76*, Robert Calvert (1978), table 9, p. 18.

[10] State Historical Society of Iowa, *The Palimpsest: Girls' Basketball in Iowa*, 1968, p. 133.

[11] Ibid., p. 140.

FIGURE 3.1

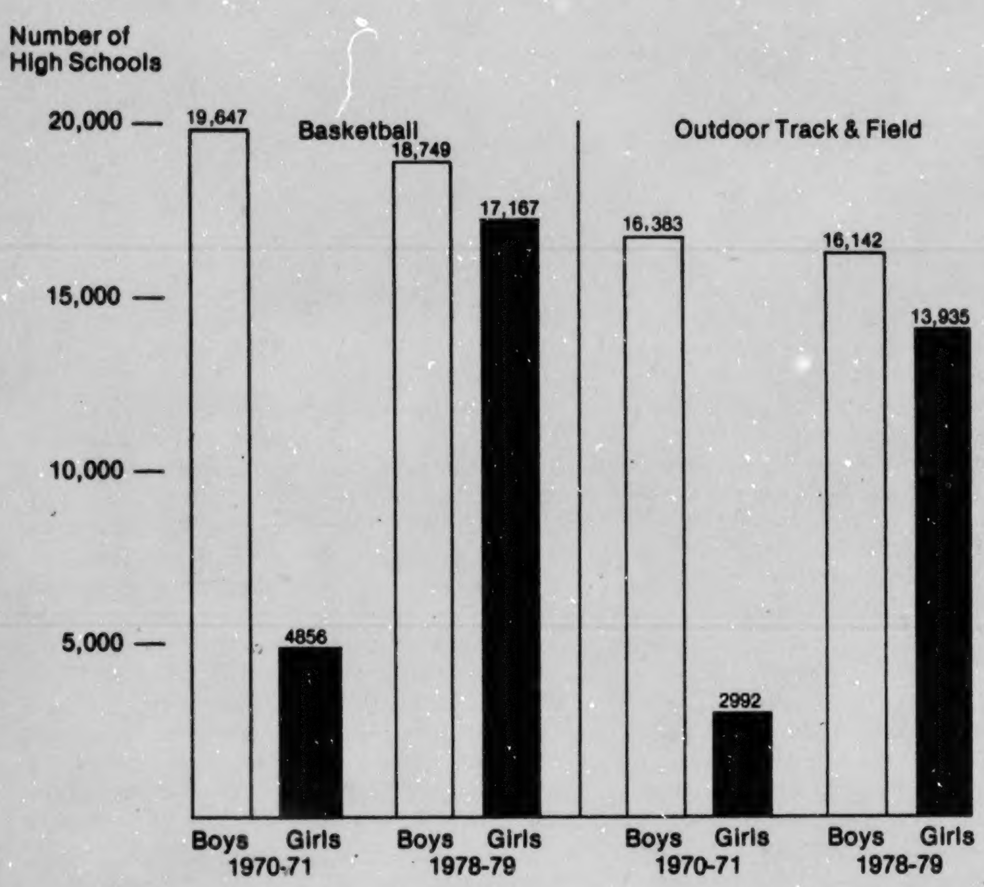
Number of Boys and Girls Participating in Interscholastic Athletics 1970-71 to 1978-79



Source: National Federation of State High School Associations, *Sports Participation Survey*, 1971, 1973, 1974, 1976, 1978.

FIGURE 3.2

Number of High Schools Offering Interscholastic Basketball and Outdoor Track and Field To Boys and Girls, 1970-71 and 1978-79



Source: National Federation of State High School Associations, *Sports Participation Survey*, 1971 and 1978.

TABLE 3.1

Number and Percent of Boys and Girls Participating in the Five Most Popular Interscholastic Sports 1978-79

Sport	Boys		Girls		Total	
	No.	Percent	No.	Percent	No.	Percent
Football	1,100,651	100.0%	0	0.0%	1,100,651	100.0%
Basketball	758,723	59.4%	518,915	40.6%	1,277,638	100.0%
Track & Field, Outdoor	678,968	60.3%	447,627	39.7%	1,126,595	100.0%
Baseball/Softball	435,519	71.1%	176,906	28.9%	612,425	100.0%
Wrestling	338,228	100.0%	0	0.0%	338,228	100.0%
Total	3,312,089	74.3%	1,143,448	25.7%	4,455,537	100.0%

Source: National Federation of State High School Associations, *Sports Participation Survey*, 1978.

half-court game for girls (now abandoned by all other States except Oklahoma and Arkansas)[12], basketball continues to be an enormously popular sport for spectators as well as participants. Girls' softball, too, is very popular; in fact, gate receipts from girls' basketball and softball competitions generate sufficient revenue to help pay for the rest of the girls' athletic program, including seven other sports.[13] The example of Iowa demonstrates that with the support of a dedicated athletic staff, girls will participate in interscholastic sports in large numbers.[14]

Two-Year Colleges

Two-year colleges (sometimes called community colleges or junior colleges) began a rapid expansion after the Second World War. Because most 2-year colleges are smaller than traditional 4-year colleges and have a higher proportion of part-time students,[15] athletic opportunities have frequently been limited. Most 2-year colleges, for instance, do not offer football,[16] the sport with the largest number of participants in high schools.[17]

To determine the number of sports available to men and women, the Commission analyzed information contained in directories of the National Association of Collegiate Directors of Athletics (NACDA). Each year NACDA publishes directories of coaches of sports at member 2-year and 4-year colleges.[18] Most colleges with intercollegiate programs are listed in the NACDA directories, making these directories the most comprehensive source of national information available. The NACDA began publishing an annual women's directory in 1973-74 in addition to its annual men's directory.

Between 1973-74 and 1978-79, the number of sports included in the directories for women increased from an average of 0.9 sports per college to

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[12] "Tennessee Goes to Full-Court Basketball for Girls," *Education Daily*, Mar. 30, 1979, p. 6.

[13] Jim Enright, *Only in Iowa* (Iowa Girls' High School Athletic Union, 1976), p. 223.

[14] It was not possible to collect national data on specific areas of high school athletic programs. The publication "Almost As Fairly," prepared by the American Friends Service Committee, however, provides a wealth of anecdotal data on the failure of a number of schools in the Southeast to provide equal athletic programs for high school girls and boys. American Friends Service Committee, "Almost as Fairly: The First Year of Title IX Implementation in Six Southern States," 1977.

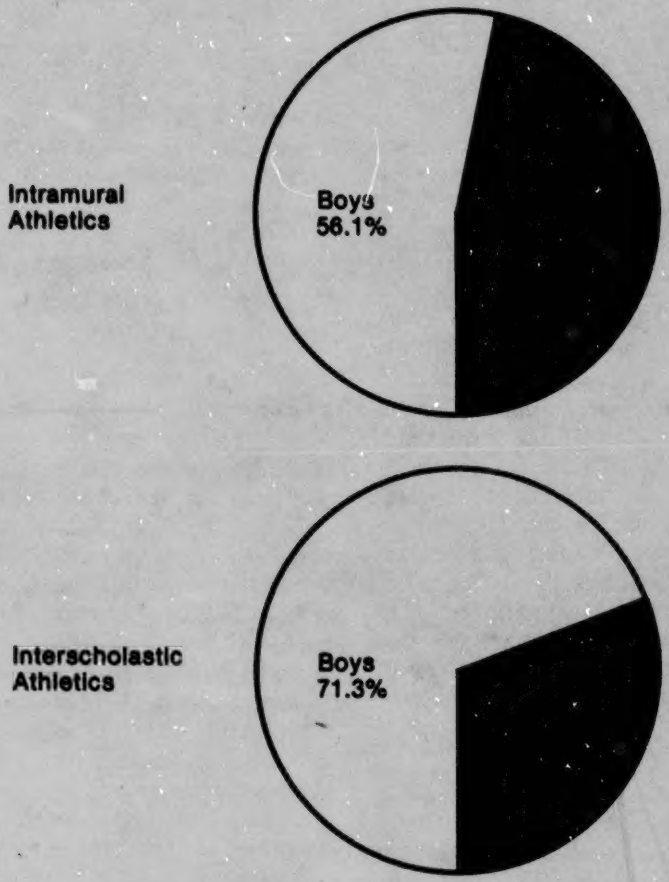
[15] Leland L. Medsker and Dale Tillery, "Breaking the Access Barrier," in Lewis B. Mayhew, *The Carnegie Commission on Higher Education*, Jossey-Bass Publishers, 1973, pp. 149-54.

[16] Analysis of data on sports available at 2-year colleges shows that 76.8 percent do not offer football. National Association of Collegiate Directors of Athletics, *Directory of College Athletics, Men's Edition, 1978-79*, pp. 305-384.

[17] *Sports Participation Survey*, National Federation of State High School Associations, 1978.

[18] National Association of Collegiate Directors of Athletics, *Directory of College Athletics, Men's Edition and Women's Edition, 1973-74, 1977-78, 1978-79.*

FIGURE 3.3
Proportion of Boys and Girls Participating in Intramural and Interscholastic Athletics



Source: National Center for Education Statistics, "Athletic Injuries and Deaths in Secondary Schools and Colleges, 1975-76," 1978, table 9.

2.9 sports per college, an increase of 222.2 percent. Nevertheless, the average number of sports for women in 1978–79 was 42.0 percent lower than the average number of sports for men, an average of 5.0 per college. Figure 3.4 shows that although the number of sports for women has increased dramatically, it still remains well below the number of sports for men. In addition, although 776 2-year colleges offered intercollegiate sports for men in 1978–79, only 562 offered such sports for women; 214 colleges, 27.6 percent of the total, reported offering no intercollegiate sports at all for women.

The disproportionate emphasis on sports for men and the lack of emphasis on sports for women can be seen in the availability of sports among colleges that belong to the National Junior College Athletic Association (NJCAA), the national organization of 2-year college athletics.[19] In 1977–78, the most recent year for which data are available, 564 2-year colleges belonged to the men's division, and 434 belonged to the women's division, 23.0 percent fewer. NJCAA sanctions 20 different intercollegiate sports for men, and 13 for women, 35.0 percent fewer.[20] The most frequently available sports were offered to men more often than they were offered to women, as shown in figure 3.5.

The most frequently available sport for men and women was basketball: 535 2-year colleges offered it to men; 367 offered it to women, 31.4 percent fewer. The second most popular sport for men was baseball, offered in 379 colleges; 204 colleges offered women's softball, 46.2 percent fewer than the number of colleges that offered men's baseball.[21] The third most popular sport for men and women was tennis, available to men in 369 colleges and to women in 244 colleges, 33.9 percent fewer. A complete list of the availability of interscholastic sports at 2-year colleges that belong to NJCAA is shown in table A.3 in appendix A.

Although annual participation figures are not available, data from NCES show that in 1975–76, women constituted 24.3 percent of all intercollegiate participants. The proportion of women in intramural sports was 29.4 percent, 21.0 percent higher, as shown in figure 3.6. Overall, interscholastic opportunities for women at 2-year colleges appear to be quite limited, and fewer women participate in interscholastic sports than in intramural sports. Despite the large increase in the number of sports available to women at 2-year colleges since 1973, the average college continues to offer far fewer sports to women than to men. Although they offer sports for men, over one-quarter of all 2-year colleges do not report offering any sports at all to women.

Four-Year Colleges

Athletics are a dominant and integral feature of the Nation's 4-year, post-secondary educational institutions. Many colleges[22] offer an extremely comprehensive sports program,[23] and participation in college athletics is important both to the student who intends to continue in amateur athletics, including the Olympics, and to the student who plans a professional sports career following graduation. Colleges are also an important source of education, training, coaches, and facilities for future amateur and professional athletes.[24] Colleges spend vast amounts of money on athletics; one study showed the total value of athletic facilities at the Nation's college campuses to be well over $5 billion,[25] and millions of dollars in grants-in-aid are given each year to students who participate in intercollegiate athletics.[26]

Traditionally, the resources of college athletic departments have been directed towards men, and women's programs have enjoyed relatively limited support. Prior to the enactment of Title IX, few of the Nation's intercollegiate athletic participants were women, and relatively few women participated in intramural sports programs. Since Title IX became effective, however, athletic departments have begun to recognize their responsibilities to female students, and athletic opportunities for women have been increasing.

Unlike high schools and 2-year colleges, athletics in 4-year colleges are governed by two national organizations, one for women and one for men. The National Collegiate Athletic Association (NCAA) is

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[19] Of the 802 2-year colleges listed in the 1978–79 NACDA directories, 70.8 percent belong to NJCAA. Ibid.

[20] National Junior College Athletic Association, *1978–79 Handbook and Casebook*, pp. 182, 196.

[21] NJCAA sanctions intercollegiate baseball for men and softball for women. Ibid., pp. 182, 196.

[22] The term colleges will be used to signify colleges and universities that offer a baccalaureate degree.

[23] *President's Commission on Olympic Sports*, p. 331.

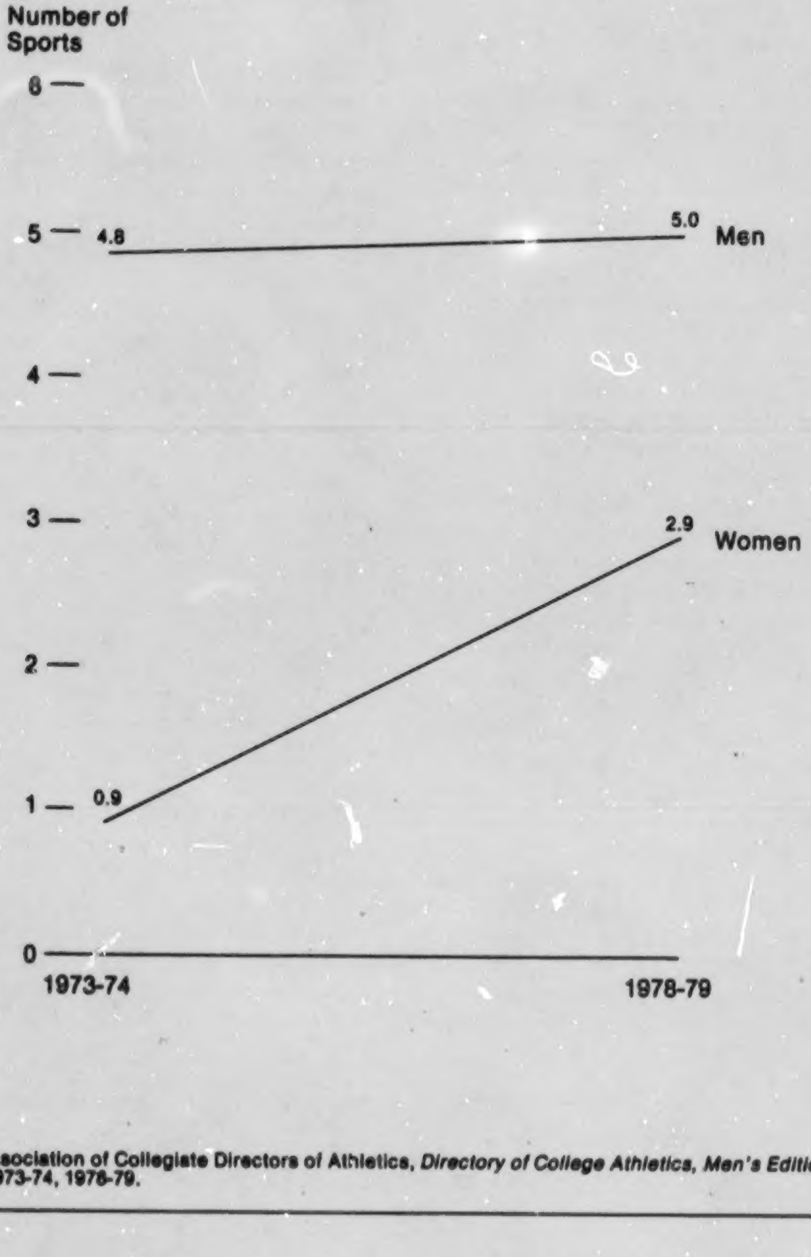
[24] National Collegiate Athletic Association, *The Sports and Recreational Programs of the Nation's Universities and Colleges: Report Number Five (Corrected Copy)*, 1978, p. 46.

[25] Ibid., p. 37.

[26] Mitchell H. Raiborn, *Revenues and Expenses of Intercollegiate Athletic Programs*, 1978, p. 30.

FIGURE 3.4

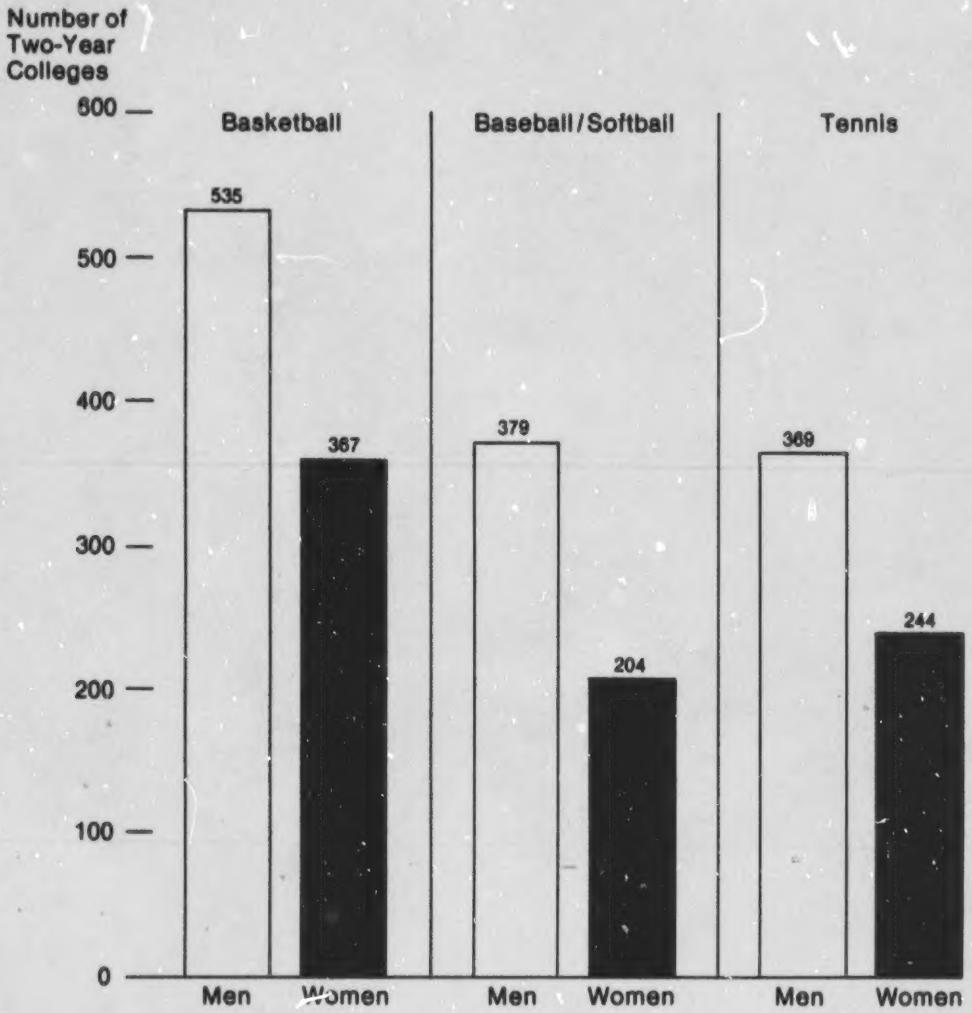
Average Number of Men's and Women's Intercollegiate Sports at Two-Year Colleges 1973-74 to 1978-79



Source: National Association of Collegiate Directors of Athletics, *Directory of College Athletics, Men's Edition* and *Women's Edition*, 1973-74, 1978-79.

FIGURE 3.5

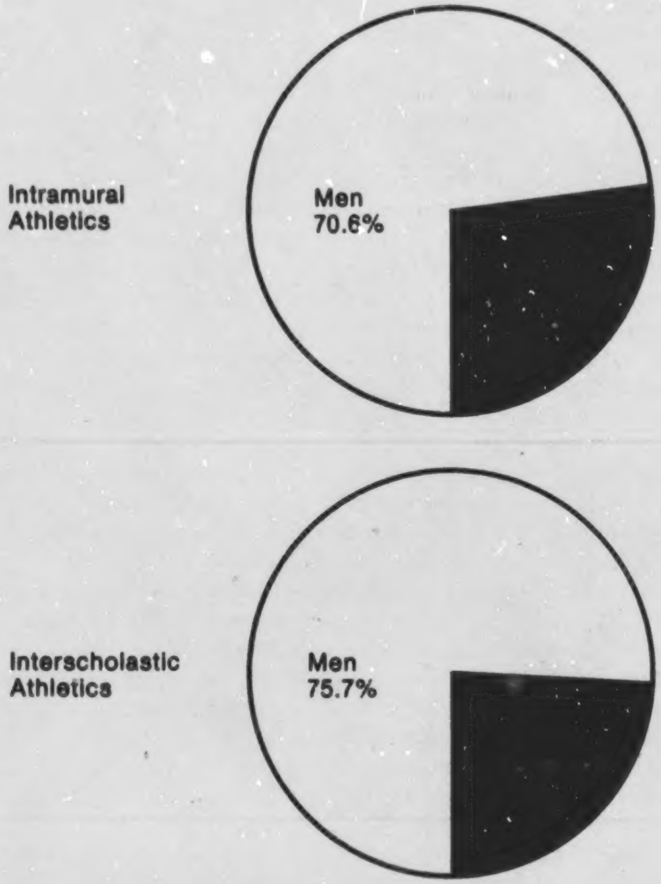
Number of Two-Year Colleges Offering Men and Women the Three Most Popular Sports 1977-78



Source: National Junior College Athletic Association, *1978-79 Handbook and Casebook*, 1978.

FIGURE 3.6

Proportion of Men and Women Participating in Intramural and Interscholastic Athletics at Two-Year Colleges 1975-76



Source: National Center for Education Statistics, "Athletic Injuries and Deaths in Secondary Schools and Colleges, 1975-76," 1978, table 9.

the primary organization of men's athletics and represents the major athletic departments,[27] including those with the most extensive and costly athletic programs.[28] The NCAA establishes standardized rules for eligibility, competitions, grants-in-aid, and other aspects of athletics. In 1978, 726 colleges belonged to the NCAA.

Colleges that belong to the NCAA participate in athletic competitions in one of three divisions. Division I colleges have the most extensive and costly programs. Among them are the "big-time" sports schools with large stadiums; they may offer a maximum of 95 grants-in-aid to football athletes, 15 to basketball athletes, and 80 to athletes in other men's sports. Division III colleges, by contrast, offer no athletic grants-in-aid and have much smaller athletic programs overall. Division II colleges have programs intermediate in size and cost.[29]

The Association for Intercollegiate Athletics for Women (AIAW) governs women's athletics. In the past, some regulations for female student athletes established by AIAW differed considerably from regulations for male athletes established by NCAA. Until recently, for instance, AIAW member institutions were not permitted to award grants-in-aid to female athletes that covered room and board, although the NCAA permitted its member institutions to award such scholarships to male athletes. Recent changes in AIAW regulations have led to the elimination of many of the differences in regulation.[30]

Data on the numbers of men and women who participate in intercollegiate athletics are available from a 1977 survey conducted by the NCAA of its member institutions.[31] In 1976–77, 170,384 men (72.6 percent of all athletes) and 64,375 women (27.4 percent) participated in intercollegiate sports. The number of female athletes has increased 102.1 percent since 1971–72, the time of the previous survey; moreover, the number of female athletes is four times the number 10 years ago.[32] Increases in the percentage of men and women on intercollegiate teams from 1966–67 to 1976–77 are shown in figure 3.7.

The five intercollegiate sports with the largest number of participants at NCAA institutions are football, baseball/softball,[33] basketball, track, and tennis. In some sports, the proportions of men and women are almost equal, but in others the proportions are far from equal. In tennis, for instance, women constitute 48.3 percent of all intercollegiate players, while men constitute 51.7 percent. In basketball, women constitute 42.5 percent of all athletes, and men are 57.5 percent. Although considerable numbers of women participate in track and softball, men in track outnumber women 4-to-1, and men playing baseball outnumber women playing softball 3-to-1. Football, the most expensive (in terms of aggregate expenditures) intercollegiate sport commonly offered by colleges,[34] and the sport with the largest number of collegiate players nationwide,[35] is the only major sport played solely by men. Women have no sport to compare with the nationwide popularity of football. The proportion of men and women in the five intercollegiate sports with the most participants is shown in figure 3.8. A complete list of the number of men and women playing intercollegiate sports, and the number of NCAA member institutions offering each sport, are shown in table A.4 in appendix A.

Data on the number of sports offered to men and women at most colleges in the Nation are available from the NACDA directories. These directories list 1,179 coeducational colleges with intercollegiate athletic programs. In 1978–79 the typical collegeoffered an average of 5.0 sports to women and 7.4 sports to men.

The number of sports offered by individual colleges varies widely. Some colleges have no sports at all for women; a few offer as many as 17 different sports to women in comparison with 22 sports to men. Generally, smaller colleges and colleges that

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[27] The other major national men's athletic organization is the National Association of Intercollegiate Athletics (NAIA), comprising smaller colleges with less extensive athletic programs; many colleges belong to both NAIA and to NCAA. *President's Commission on Olympic Sports*, p. 325.

[28] Ibid., p. 331.

[29] *1977–78 Manual of the National Collegiate Athletic Association*, pp. 69–70, 83. Division I is subdivided into I–A and I–AA. A Division I–A institution must play 60 percent of its games with other I–A institutions. In addition, it must have had 17,000 in paid attendance over the past 4 years, *or* 17,000 in paid attendance for at least 1 year of the past 4 years and a stadium with at least 30,000 seats, *or* sponsor at least 12 NCAA sports. A Division I–AA institution must play at least 50 percent of its games with other Division I–A or I–AA institutions. "Big-Time Football Finally Gets Its Super-Division," *Chronicle of Higher Education*, Jan. 23, 1978, p. 3.

[30] "Striking a Balance in Women's Sports," *Chronicle of Higher Education*, Jan. 30, 1978, p. 5.

[31] NCAA, *Sports and Recreational Programs*, tables 1 and 3, pp. 5 and 13.

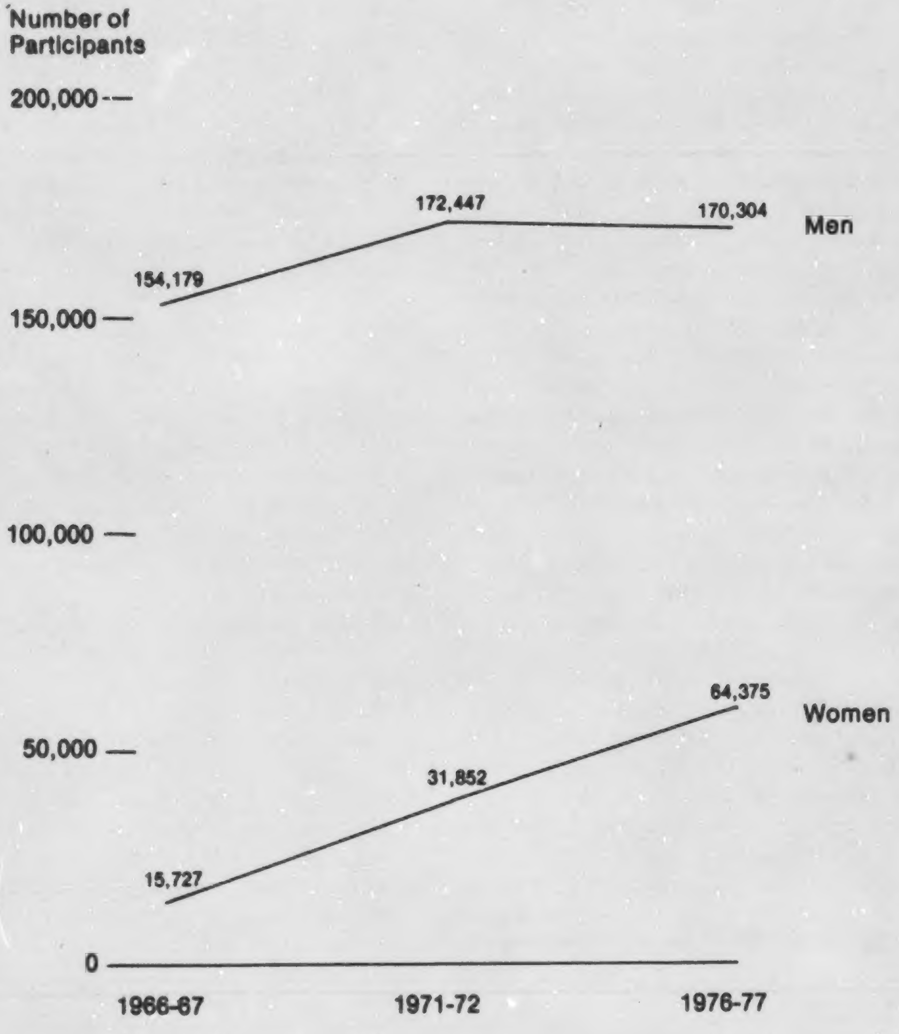
[32] NCAA, "Comments of the National Collegiate Athletic Association on the Proposed Policy Interpretation of the Department of Health, Education, and Welfare Regarding Application of Its Title IX Regulation to Intercollegiate Athletics" (1979), p. 11.

[33] On the intercollegiate level, baseball is usually played by men and softball by women.

[34] NCAA, *Revenues and Expenses*, p. 31.

[35] NCAA, *Sports and Recreational Programs*, table 1, p. 5.

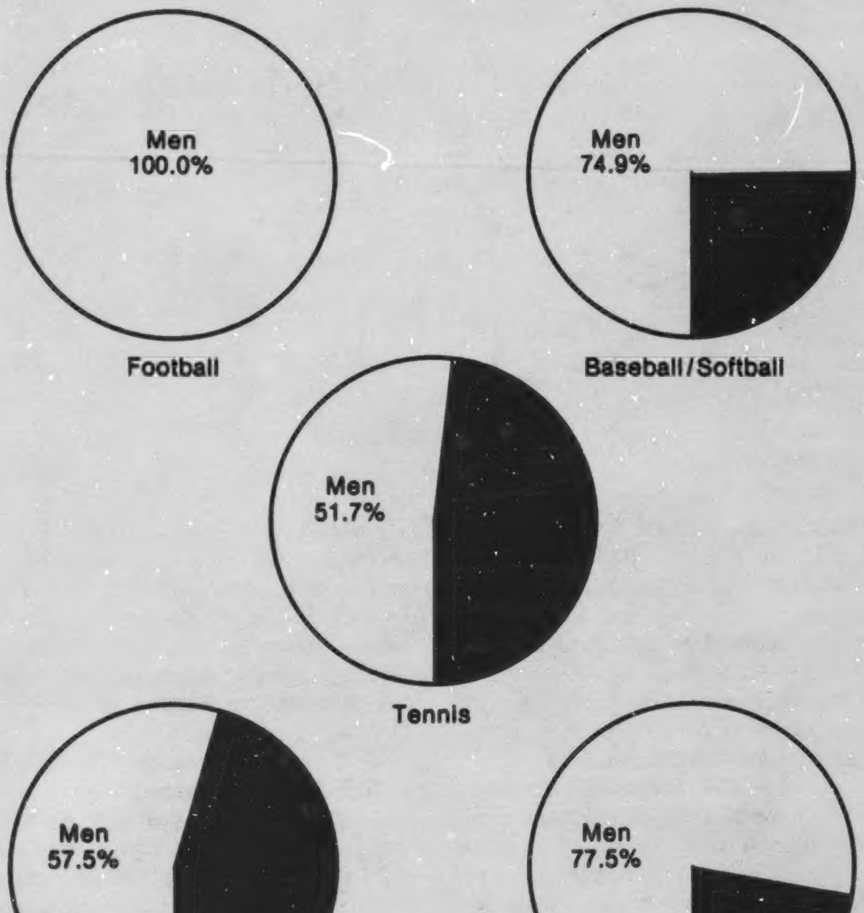
FIGURE 3.7
Number of Men and Women Participating in Intercollegiate Athletics
1966-67 to 1976-77



Source: Comments of the National Collegiate Athletic Association on the Proposed Policy Interpretation of the Department of Health, Education, and Welfare Regarding Application of its Title IX Regulation to Intercollegiate Athletics, p. 11.

FIGURE 3.8

Proportion of Men and Women Participating in the Five Most Popular Intercollegiate Sports, 1976-77



Source: National Collegiate Athletic Association, *The Sports and Recreational Programs of the Nation's Universities and Colleges: Report Number Five, Corrected Copy*, tables 1 and 3.

TABLE 3.2

Number and Percent of Men and Women Participating the the 10 Most Popular Intramural Sports at NCAA Colleges, 1977-77

Sport	Men		Women		Total	
	No.	Percent	No.	Percent	No.	Percent
Basketball	493,349	84.3%	91,541	15.7%	584,890	100.0%
Softball	351,908	73.2%	129,159	26.8%	481,067	100.0%
Football, Touch	360,075	85.9%	58,929	14.1%	419,004	100.0%
Volleyball	209,860	61.9%	129,124	38.1%	338,894	100.0%
Soccer	88,057	90.2%	9,617	9.8%	97,674	100.0%
Tennis	67,301	71.5%	26,873	28.5%	94,174	100.0%
Track and Field	53,178	83.6%	10,415	16.4%	63,539	100.0%
Swimming	42,293	69.5%	18,589	30.5%	60,882	100.0%
Bowling	39,750	72.5%	15,103	27.5%	54,853	100.0%
Badminton	24,694	61.2%	15,662	38.8%	40,356	100.0%

Source: National Collegiate Athletic Association, *The Sports and Recreational Programs of the Nation's Universities and Colleges: Report Number Five, Corrected Copy*, 1978, table 4.

do not offer football tend to have fewer sports for both women and men. For example, colleges with 1,000 or fewer students and without football offer an average of 2.7 sports to women and 4.0 sports to men; colleges with more than 10,000 students that have football offer an average of 6.4 sports to women and 8.9 sports to men. A complete list of the average number of sports that colleges offered in 1978–79 is shown in table A.5 in appendix A.

Analysis of the NACDA directories also shows that the number of sports available for women has increased 100.0 percent since 1973–74,[26] from an average of 2.5 per college to an average of 5.0 per college. Men's programs have increased very slightly (1.4 percent) during this time period, from an average of 7.3 per college to an average of 7.4 per college. Increases in the number of sports available to men and women are shown in table A.6 in appendix A.

Although the number of sports offered to women has increased markedly since 1973–74, the number of sports available to men in 1978–79 was an average of 48.0 percent higher than the number of sports available to women. Differences in the number of sports for men and women were especially great at smaller colleges with football. Overall, colleges with football tended to have slightly fewer sports for women compared with the number of sports for men than did colleges without football. A complete list of the differences in the number of sports is shown in table A.7 in appendix A.

Unlike the situation in high schools and 2-year colleges, the proportion of intramural participants who are women at 4-year colleges (21.8 percent) is smaller than the proportion in intercollegiate sports (27.4 percent). Nevertheless, the number of women on intramural teams has been increasing rapidly. In 1976–77, 576,648 women took part in intramural sports at NCAA institutions, compared with 2,067,107 men. The number of female participants has increased 108.8 percent since 1971–72, and the number of male participants has also increased somewhat, 23.3 percent. NCAA data show that these increases continue a trend that has been developing for a number of years; the number of women on intramural teams increased 67.3 percent between 1966–67 and 1971–72, and the number of men increased 31.6 percent in that time period. The increases in the numbers of men and women on intercollegiate and intramural teams are shown in table A.8 in appendix A.

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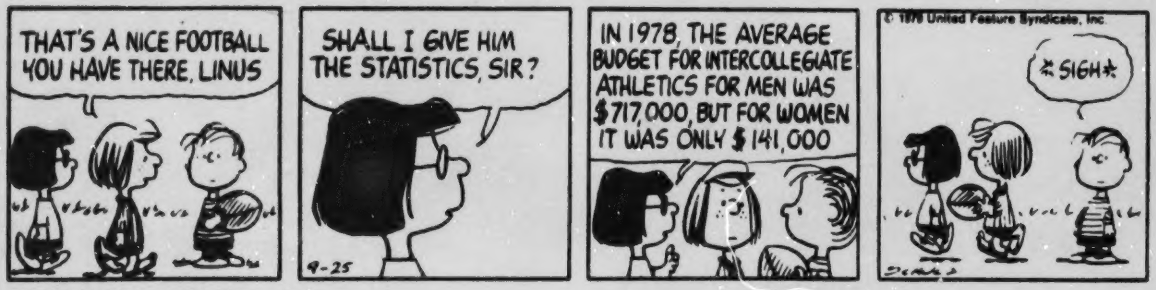
[26] 1973–74 was the first year the NACDA women's directory was published.

An examination of the proportion of women on intramural teams reveals that these teams are far less sex stereotyped than intercollegiate teams. Touch football and soccer, for instance, are played by a total of 68,546 women on intramural teams, despite the fact that almost no women play either of these sports on intercollegiate teams. This relatively high level of intramural participation by women in touch football and soccer suggests that intercollegiate athletics may not be adequately serving the interests of female students and that women might enjoy competing in either of these sports on an intercollegiate basis. A list of the number of men and women participating in the 10 most popular intramural sports is shown in table 3.2.

Overall, these data on the status of women in college athletics show that the number of women athletes and the number of sports offered to women have increased markedly since the early 1970s. Nevertheless, the number of female athletes remains well below the number of male athletes, and women are still offered fewer sports than men at most colleges in the Nation.

Chapter 4

Men's and Women's Intercollegiate Athletic Budgets


THAT'S A NICE FOOTBALL YOU HAVE THERE, LINUS
SHALL I GIVE HIM THE STATISTICS, SIR?
9-25
IN 1978, THE AVERAGE BUDGET FOR INTERCOLLEGIATE ATHLETICS FOR MEN WAS $717,000, BUT FOR WOMEN IT WAS ONLY $141,000
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SIGH
SCHULZ

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One important measure of the extent to which colleges treat men and women equally is the amount of money budgeted for men's and women's athletic programs. As the previous chapter demonstrated, the number of female athletes is larger than ever before, but there are considerably fewer female athletes than male athletes. Although there are many factors contributing to lower female participation rates,[1] one factor that may limit the number of female athletes is relatively less money allocated to women's programs. Traditionally, women have received disproportionately less money for their programs than men. As recently as 1977–78, for instance, one major university was reported to have budgeted about $5 million for men's athletics but only $180,000 for women's athletics.[2]

Information on college athletic budgets for men and women has been collected by the Association for Intercollegiate Athletics for Women (AIAW).[3] The typical college that belongs to AIAW has 102 female athletes (30.0 percent) and 238 male athletes (70.0 percent). The average athletic budget does not reflect these proportions, however. The typical budget in 1978–79 totaled $858,000; of this amount, 83.6 percent was for the men's program and 16.4 percent was for the women's program. On a per capita basis, the average AIAW college spent $1,382 for each female athlete and $3,013 for each male athlete, 117.9 percent more for men.

The differences are greater in colleges belonging to AIAW and to Division I of the NCAA. These colleges spend an average of 14.3 percent of their

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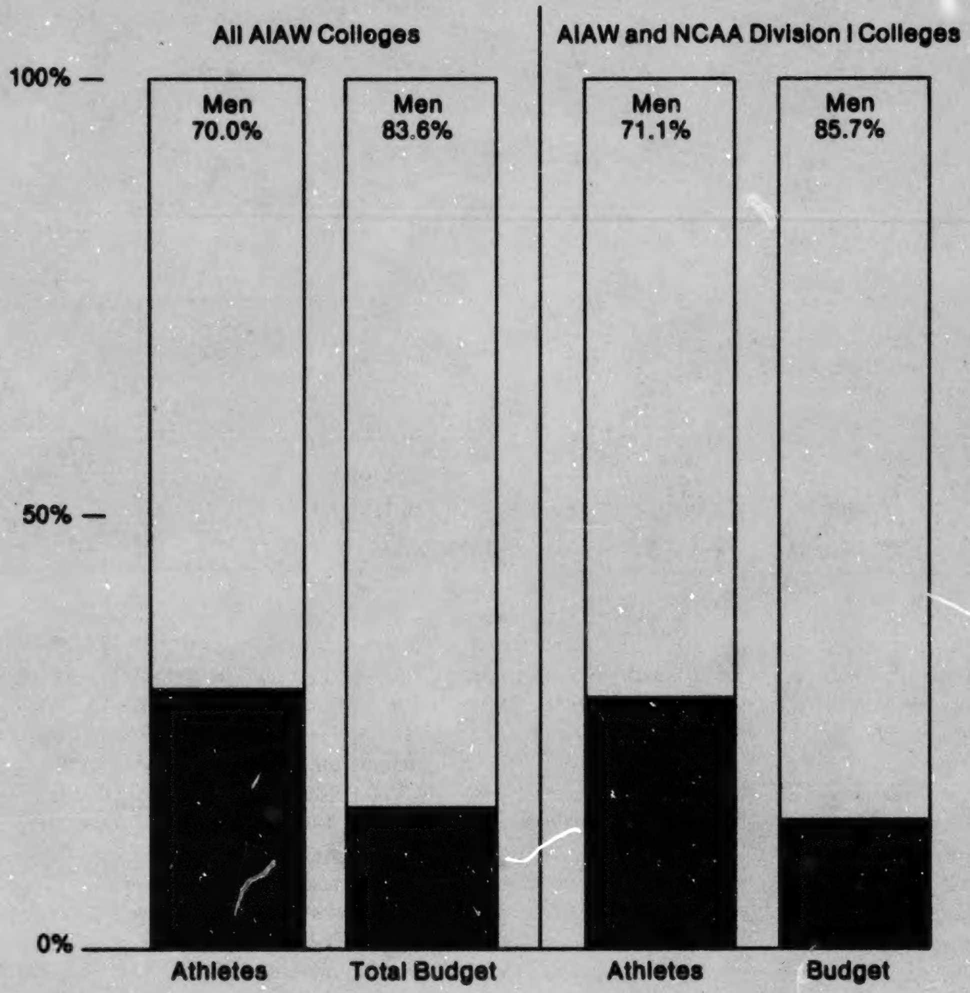
[1] Chapter 1 discusses several factors contributing to relatively low female participation rates, for example, social pressures that influence many girls to give up sports in their teenage years.

[2] Margaret Roach, "Is Title IX Scoring Many Points In Field of Women's School Sports?" *New York Times*, Sep. 27, 1977, p. 51.

[3] AIAW, *AIAW Competitive Division Structure Implementation Survey: Final Data Summary*, Fall, 1978, table XIV.

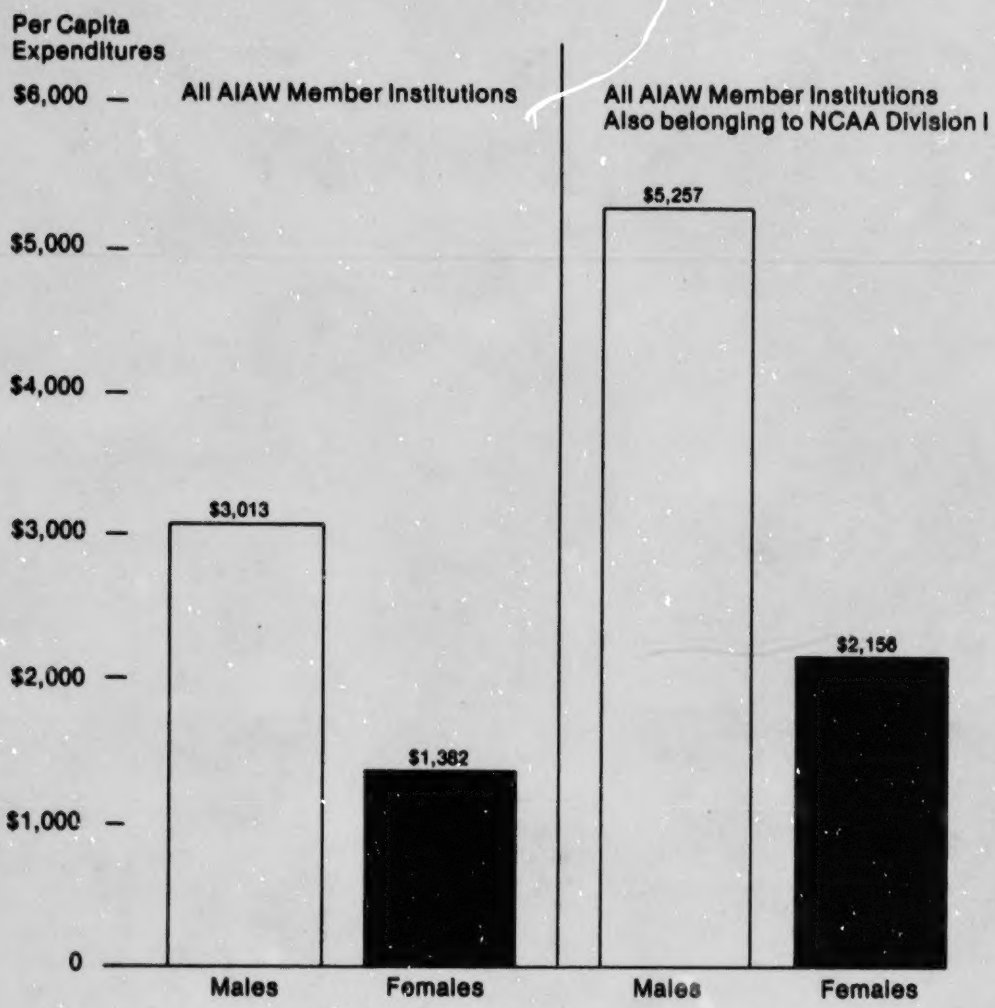
FIGURE 4.1
Proportion of Male and Female Athletics and Proportion of Budget for Men and Women 1978-79



Source: Association for Intercollegiate Athletics for Women, *AIAW Competitive Division Structure Implementation Study: Final Data Summary*, Fall, 1978, table XIV.

FIGURE 4.2

Per Capita Expenditures for Men and Women 1978-79



Source: Association for Intercollegiate Athletics for Women, *AIAW Competitive Division Structure Implementation Study: Final Data Summary*, Fall, 1978, table XIV.

total athletic budgets on women's athletics, even though women constitute 28.9 percent of the athletes. The colleges spend an average of $2,156 on each female athlete and $5,257 on each male athlete, 143.8 percent more. The proportions of the average budget allocated to men and women at all AIAW colleges and at AIAW colleges that belong to NCAA Division I are shown in figure 4.1. The per capita expenditures for men and women are shown in figure 4.2.

The disproportionately larger amount budgeted for men's athletics has frequently been explained by the fact that at least part of the men's program produces revenues. Gate receipts and broadcast fees from athletic competitions, particularly in mass spectator sports such as football and basketball, help defray the costs of men's sports and sometimes earn a profit. This is true especially in Division I.[4] Data on men's athletic revenues and expenditures collected by the National Collegiate Athletic Association (NCAA) show, however, that many men's athletic departments lose money. In 1976–77, 66 percent of all men's athletic programs failed to generate sufficient revenues to cover their expenses.[5] In the popular—and expensive—spectator sports of football and basketball, the percentage of programs that lost money was even higher. About one-half of the colleges with Division I football lost money on that sport, and almost all Division II and III football programs lost money,[6] as did 76 percent of basketball programs in all three divisions.[7] Moreover, the revenues at 51 percent of NCAA colleges include mandatory admission fees collected from all students during registration.[8] Without this source of funds, the proportion of programs that lost money would probably have been even greater.

In addition to losing money at many colleges that offer them, football and basketball are also the most expensive sports offered. The average college with Division I football spends $1,045,000 on that sport, or 47 percent of its men's athletic budget.[9] The average Division I football squad is composed of 106 athletes;[10] these colleges therefore spend an average of $9,858 on each football athlete.[11] Men's Division I basketball costs an average of $245,000, or 11 percent of the typical Division I men's budget.[12] The average Division I basketball team has 20 athletes,[13] which is equal to an average expenditure of $12,250 per athlete. In contrast, these Division I colleges average 231 athletes in all other sports,[14] spend $332,000 on those sports,[15] and thereby average $1,437 per male athlete for all sports excluding football and men's basketball. Per capita expenditures for men and women are shown in figure 4.3.

The large amount of money budgeted for men's football and basketball is, to a great extent, attributable to the high cost of two items: grants-in-aid and travel and recruiting.[16] These two items account for 36 percent of the Division I budget for football and men's basketball.[17] NCAA regulations permit a maximum of 95 "full ride" grants-in-aid (tuition, room and board) for football athletes and 15 "full ride" grants-in-aid for basketball athletes. Almost all athletes in these two sports, in other words, are permitted to be on full scholarship. Recent efforts by Division I institutions to limit grants-in-aid to athletes with proven financial need have not been successful.[18] In addition, NCAA regulations permit athletic departments to pay all recruiting expenses for prospective athletes,[19] and football and male basketball athletes frequently receive first class travel and accommodations in intercollegiate competitions.[20]

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[4] About three quarters of the Division I respondents to an NCAA survey reported that the fiscal objective of their intercollegiate athletic program was either to earn sufficient revenues to cover expenses or to earn a profit. Mitchell H. Raiborn, *Revenues and Expenses of Intercollegiate Athletic Programs*, 1978, p. 38.

[5] This percentage was derived from data in table 4.2 which show that 174 (66 percent) of 264 respondents lost money in fiscal year 1977. Ibid., p. 40.

[6] Forty-seven percent of the Division I football schools lost money in fiscal year 1977; 92 percent of the Division II and 96 percent of Division III football schools lost money on football. Ibid., table 4.5, p. 43.

[7] This percentage was derived from data in table 4.7 which show that 170 (76 percent) of 224 respondents lost money on basketball in fiscal year 1977. Ibid., p. 45.

[8] Ibid., pp. 16 and 62.

[9] Ibid., table 3.13, p. 31.

[10] This figure was obtained by dividing the number of colleges with Division I football (137) into the total number of Division I football athletes (14,523). NCAA, *The Sports and Recreational Programs of the Nation's Universities and Colleges: Report Number Five (Corrected Copy)*, 1978 table 1, p. 5.

[11] Per capita expenditures were computed from data in two NCAA publications. *Sports and Recreational Programs*, table 1, provides participation figures, and Mitchell H. Raiborn, *Revenues and Expenses*, table 3.13, provides budget data. Unfortunately, the participation data are not complete for all divisions and the budget data are not complete for all sports, so the only per capita expenditure calculations that can be made are for the 137 colleges with Division I football and men's basketball programs.

[12] *Revenues and Expenses*, table 3.13, p. 31.

[13] This figure was obtained by dividing the number of colleges with Division I basketball (136) into the total number of Division I basketball athletes (2,688). *Sports and Recreational Programs*, table 1, p. 5.

[14] This figure was obtained by dividing the number of colleges with Division I basketball and football (137) into the total number of athletes in all sports excluding football and basketball (31,616). Ibid.

[15] *Revenues and Expenses*, table 3.13.

[16] For purposes of reporting, the NCAA combines team travel, scouting, and recruiting as one category. *Revenue and Expenses*, p. 27.

[17] Ibid., tables 3.18 and 3.22, pp. 34 and 37.

[18] Cheryl M. Fields, "Women Return 'Full-Ride' Scholarships," *Chronicle of Higher Education*, Jan. 23, 1978, p. 14.

[19] National Collegiate Athletic Association, *1977–78 Manual*, p. 41.

Although AIAW regulations also permit "full ride" grants-in-aid for female athletes, and for athletic departments to pay recruiting expenses, AIAW data show that women receive considerably less money for grants-in-aid than men.[21] Moreover, women's travel budgets are often so restricted that women's teams are sometimes prohibited from participating in competitions beyond an arbitrary distance due to lack of funds, a restriction seldom placed on men's teams.[22]

Despite the large differences in the money colleges typically budget for men's and women's athletic programs, the differences are not as great as they were 5 years ago. Data from AIAW show that the gap has narrowed considerably since 1973–74 (the earliest year for which data are available), although men continue to receive a disproportionately large share of the average college athletic budget. In that year, men's budgets were, on the average, more than 22 times larger than women's budgets; in 1978–79, men's budgets were five times larger. At AIAW colleges that also belong to NCAA Division I, men's budgets in 1973–74 were 44 times larger than women's budgets; 5 years later, in 1978–79, they were six times larger.[23] These changes are shown in figure 4.4.

During the past 5 years, most of the decrease in the gap between men's budgets and women's budgets has occurred because of the tremendous growth in women's budgets, not because of a decline in men's budgets. At AIAW colleges, the average increase in the budget for women's athletics was over 400 percent, from an average of $26,000 in 1973–74 to $141,000 in 1978–79. At AIAW colleges that belong to NCAA Division I, the increase in women's budgets has been even greater. Budgets at these colleges are 10 times larger than they were 5 years ago, from an average of $27,000 to an average of $276,000. Men's budgets also increased during this period—by an average of more than 20 percent at all colleges belonging to AIAW and by more than 30 percent at those also belonging to NCAA Division I.

It is clear from these data that although women's budgets have increased, they continue to be considerably smaller than the men's budgets. Many men's athletic departments have expressed concern that funds to increase athletic opportunities for women would have to be taken from the men's program, adversely affecting other men's sports.[24] The data presented in this and the previous chapters show, however, that men's budgets have increased substantially in the past 5 years and that men's programs continue to be considerably larger than women's programs.

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[20] Dr. Carole Mushier, past president, Association for Intercollegiate Athletics for Women, statement before the U.S. Commission on Civil Rights, July 9, 1979, transcript, p. 138.

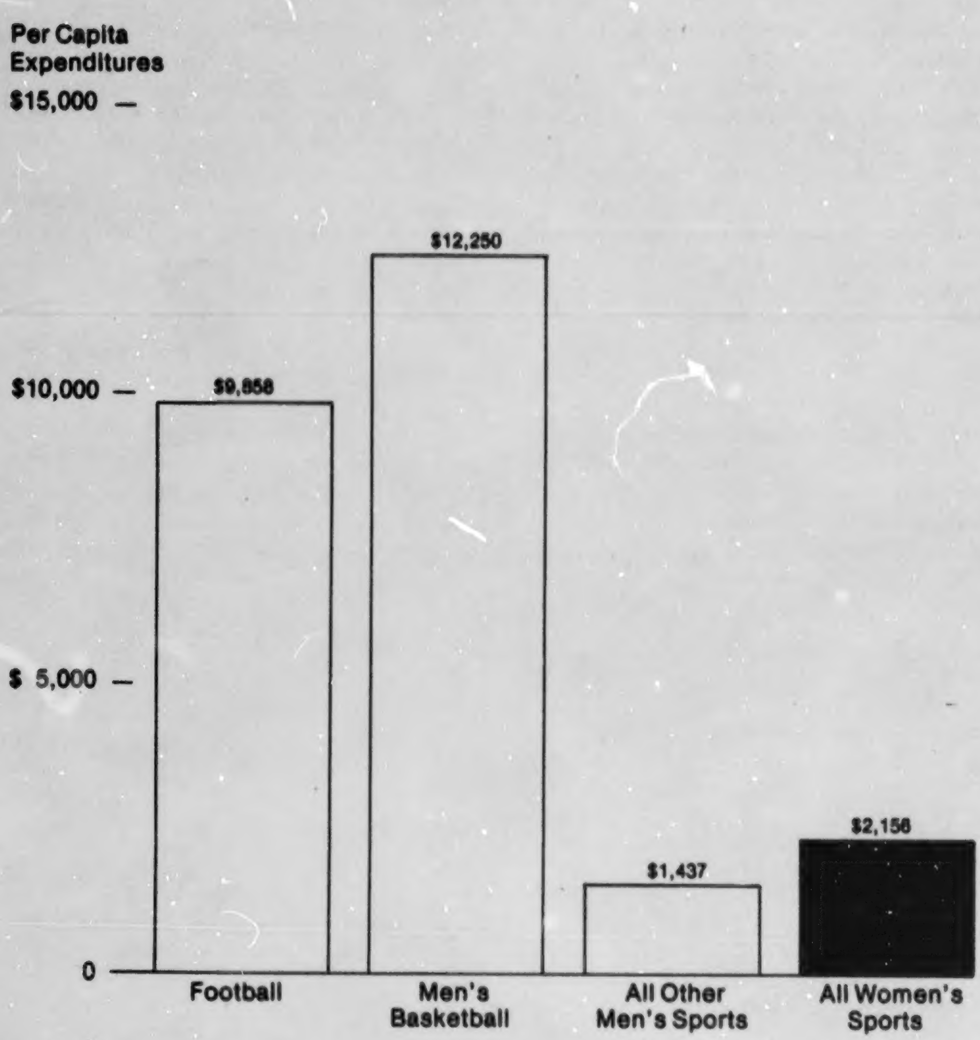
[21] AIAW, *Survey*, table XIV, p. 11.

[22] Mushier, statement before the U.S. Commission on Civil Rights, July 9, 1979, transcript, p. 100.

[23] AIAW, *Survey*, table XIV, p. 11.

[24] "Comes the Revolution," *Time*, June 26, 1978, p. 56; "Issue of Title IX Continues Under New Guidelines," *New York Times*, Dec. 9, 1979, section 5, p. 3.

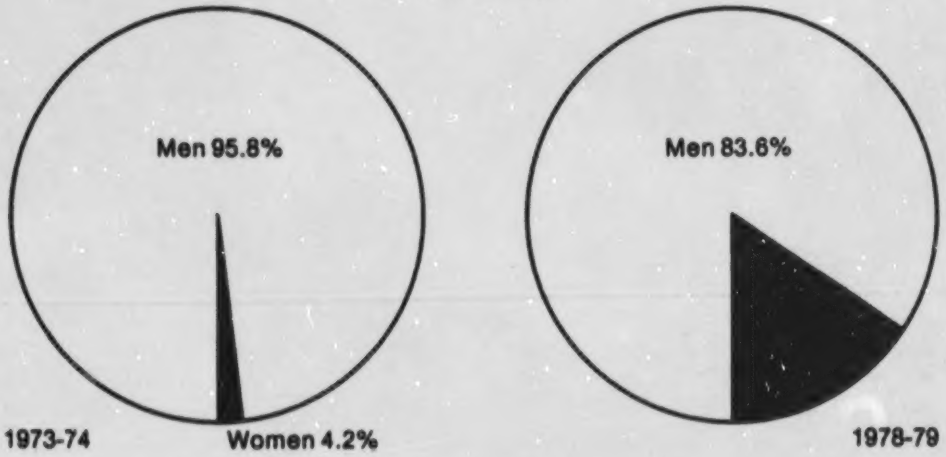
FIGURE 4.3
Per Capita Expenditures for Men and Women At NCAA Division I Colleges and AIAW Colleges



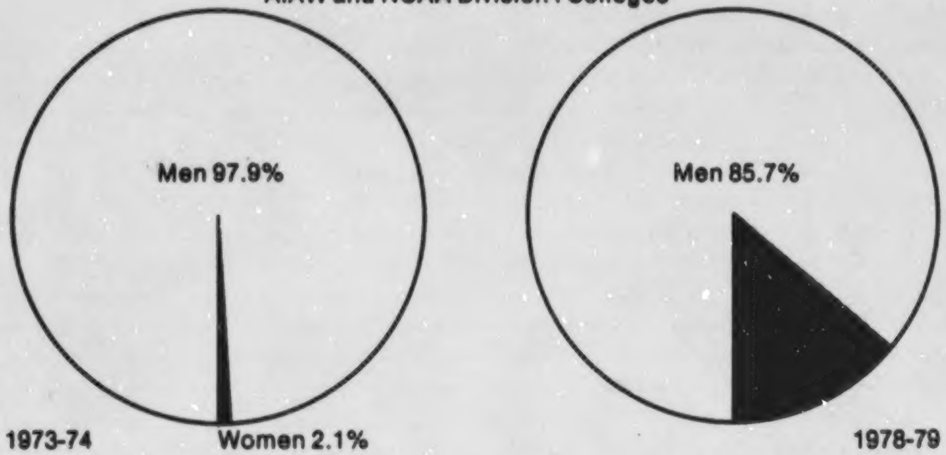
Sources: NCAA, *The Sports and Recreational Programs of the Nation's Colleges and Universities, Report Number Five (Corrected Copy)*, 1978; Mitchell H. Raiborn, *Revenues and Expenses of Intercollegiate Athletic Programs*, 1978; and AIAW, *AIAW Competitive Division Structure Implementation Survey: Final Data Summary*, Fall, 1978.

FIGURE 4.4
Average Proportion of Athletic Budgets for Men and Women 1973-74 and 1978-79

All AIAW Colleges



AIAW and NCAA Division I Colleges



Source: Association for Intercollegiate Athletics for Women, *AIAW Competitive Division Structure Implementation Study: Final Data Summary*, Fall, 1978, table XIV.

Chapter 5

The Current Status of Title IX Enforcement

Since 1972 the number of women and girls participating in competitive athletics in the Nation's secondary and postsecondary educational institutions has more than doubled, and budgets for women's athletic programs in the Nation's colleges are substantially larger than they were prior to enactment of Title IX. As the previous chapters have demonstrated, however, women and girls still lag far behind men and boys, and equality has not yet been achieved despite considerable progress.

Enforcement of Title IX is the responsibility of the Department of Health, Education, and Welfare (HEW). In November 1974 the Women's Equity Action League (WEAL) with several other groups[1] filed suit in the U.S. District Court for the District of Columbia, charging the Department with failing to fulfill its responsibilities to women and girls by not enforcing Title IX.[2] As a result of this suit, HEW was ordered by the court in December 1977 to enforce all Title IX issues according to a timetable and to close all complaints by September 1979.[3] HEW also decided at that time to initiate its own compliance reviews rather than to rely on complaints as its sole enforcement procedure, as had been its policy in the past.[4]

The Title IX implementing regulation, adopted on July 21, 1975, provided an adjustment period for athletic programs, and all educational institutions were to be in full compliance with Title IX by July 21, 1978.[5] There is evidence, however, that by that date many institutions were not in compliance with all the requirements of Title IX. By November 1978,[6] for instance, HEW had received 93 complaints alleging that 62 institutions of higher education were not providing equal opportunity for women.[7] In an attempt to provide a policy framework within which athletic complaints against colleges could be resolved and to clarify what it meant by compliance, HEW issued a proposed policy interpretation on December 11, 1978. A year later, on December 11, 1979, HEW issued a final policy interpretation[8] that incorporated some of the more than 700 comments it had received.[9]

The purpose of the policy interpretation was to provide a framework for resolving complaints and to provide a definitive statement of the responsibilities under Title IX of institutions receiving Federal financial assistance. The policy interpretation applies specifically to intercollegiate athletic programs, but HEW notes that the "general principles will often

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[1] Other groups participating in the lawsuit were the National Education Association, the National Organization for Women (NOW), the National Student Association, the Federation of Organizations for Professional Women, and the Association for Women in Science.

[2] WEAL v. Califano, No. 74-1720 (D.D.C. Dec. 29, 1977).

[3] *Id.*

[4] *Spokeswoman*, January/February 1978, p. 7.

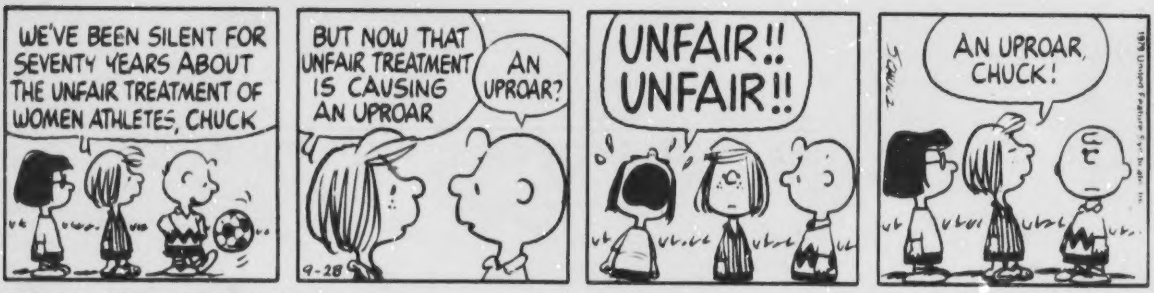
[5] 45 C.F.R. §86.41(d) 1978.

[6] *Id.*

[7] U.S., Department of Health, Education, and Welfare, Office for Civil Rights, Office of the Secretary, Title IX of the Education Amendments of 1972: A Proposed Policy Interpretation, Title IX and Intercollegiate Athletics, 43 Fed. Reg. 58070, 58071 (Dec. 11, 1978).

[8] U.S., Department of Health, Education, and Welfare, Office for Civil Rights, Office of the Secretary, "Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics," 44 *Fed. Reg.* 71413.

[9] *Id.*


WE'VE BEEN SILENT FOR SEVENTY YEARS ABOUT THE UNFAIR TREATMENT OF WOMEN ATHLETES, CHUCK
BUT NOW THAT UNFAIR TREATMENT IS CAUSING AN UPROAR
AN UPROAR?
9-28
UNFAIR!! UNFAIR!!
SCHULZ
AN UPROAR, CHUCK!

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apply to club, intramural, and interscholastic athletic programs,. . ."[10]

The policy interpretation is in three parts. The first part requires recipient institutions that provide financial assistance to athletes to use a proportionate test in making athletic grants-in-aid, so that female athletes will receive financial assistance substantially in proportion to their percentage as athletes at the institution. For instance, if women constitute 30 percent of the athletes at a recipient institution, then HEW would expect that 30 percent of the financial assistance would be awarded to female athletes. HEW did not require a proportionate number of scholarships to men and women, or individual scholarships of equal dollar value,[11] but said that it would measure compliance "by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program. . . ."[12]

Nondiscriminatory exceptions may make disproportionate amounts of financial aid permissible, however. For example, in some years public institutions may award more out-of-State scholarships to members of one sex, resulting in higher expenditures because of the tuition involved in out-of-State assistance.[13] Or an institution "may make reasonable professional decisions"[14] to postpone awarding some grants-in-aid until teams are better developed. HEW explains that institutions may need as much as a full generation of students (4 years) to develop high caliber teams, and that as a result less financial assistance than is proportionate may be granted to members of one sex during the initial years of this period of program development.[15]

The second part of the policy interpretation covers equivalence in other athletic benefits and opportunities listed in the 1975 Title IX implementing regulation.[16] Each of the program components should be "equivalent, that is, equal or equal in effect,"[17] but the components need not be identical for men and women.[18] If the components are not equivalent, institutions may still be in compliance if the differences do not have a discriminatory effect.[19]

The policy interpretation sets forth four situations in which such differences may occur. First, certain sports played only by one sex (such as football) may require different facilities, equipment, and so forth, but such "sport-specific needs"[20] should "be met equivalently" for men's and women's sports. Second, temporary circumstances not relating to sex (such as annual fluctuations in the need for new team members) may result in increased emphasis on the men's or women's program (such as large disparities in recruitment activity), but these temporary circumstances must not "reduce the overall equality of opportunity."[21] Third, the costs and resources devoted to event management for men's sports (especially football and basketball) are likely to be higher than for women's sports. This imbalance is allowed under Title IX, HEW says, only if the criteria used to justify expenditures (such as the size of the crowd) are truly sex-neutral, and if the potential for women's athletic events to rise in spectator appeal is not limited by the institution.[22] Finally, affirmative efforts to increase the athletic opportunities to overcome past sex discrimination may result in a program that temporarily emphasizes athletics for one sex. Such disproportionate emphasis is allowed.[23]

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[10] *Id.*

[11] *Id.* at 71415.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] (1) Provision and maintenance of equipment and supplies; (2) scheduling of games and practice times; (3) travel and per diem expenses; (4) opportunity to receive coaching and academic training; (5) assignment and compensation of coaches and tutors; (6) provision of locker rooms, practice and competitive facilities; (7) provision of medical and training services and facilities; (8) provision of housing and dining services and facilities; and (9) publicity.

[17] 44 *Fed. Reg.* 71415.

[18] *Id.*

[19] *Id.*

[20] HEW specifically notes that differences will most frequently occur in programs offering football. *Id.* at 71416.

[21] *Id.*

For each of the program components, the policy interpretation states specifically what is included and what is required. For example, "equipment and supplies" include "uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment."[24] The policy adds that compliance would be assessed by examining whether the following factors are equivalent for men and women:

(1) The quality of equipment and supplies;
(2) The amount of equipment and supplies;
(3) The suitability of equipment and supplies;
(4) The maintenance and replacement of equipment and supplies; and
(5) The availability of equipment and supplies.[25]

To provide clear guidelines, the policy interpretation treats each of the components in a detailed manner. Further, it states that the overall determination of compliance will be based on whether the policies of an institution discriminate "in language or effect," or whether disparities of a "substantial and unjustified nature exist" in the program as a whole or in one component sufficient to "deny equality of athletic opportunity."[26]

The third and final part of the policy interpretation concerns the requirement that institutions effectively accommodate the interests and abilities of members of both sexes. The policy interpretation states that in determining compliance HEW will examine the measurement of athletic interests and abilities, the selection of sports, and the level of competition available.[27] The interests and abilities of students may be measured in any nondiscriminatory way, provided that the following factors have been considered:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.[28]

HEW does not require that the same sport be offered for men and women, nor that teams be integrated.[29] Where an institution sponsors a team in a particular sport for members of one sex, however, it may be required to permit the other sex to try out for the team or to sponsor a separate team for them.[30] If a team is sponsored for members of one sex in a contact sport, one must also be sponsored for members of the other sex if opportunities for members of the excluded sex were limited in the past and if there is sufficient interest and ability to sustain a viable team with "reasonable expectation"[31] that there will be opportunities for intercollegiate competition. The same rules apply to non-contact sports if, in addition, members of the excluded sex do not possess sufficient skill to be selected for a single integrated team or to compete actively on such a team.[32] HEW does not require institutions to develop new teams or upgrade existing teams to the intercollegiate level if there is no "reasonable expectation"[33] that there will be opportunities to compete. The interpretation notes, however, that institutions "may be required. . .to actively encourage the development of such competition. . .when overall athletic opportunities within that region have been historically limited for the members of one sex."[34]

A recent Supreme Court ruling, *Cannon v. University of Chicago*, [35] will probably provide added momentum for increased athletic opportunity for girls and women. In *Cannon* the court ruled that an individual has a right to sue a recipient of Federal funds for alleged violation of Title IX, and need not file a complaint with HEW (or in the future, the new Department of Education).[36] In other words, women and girls who feel that they have not been offered equal athletic opportunity (as required by the 1975 implementing regulation and the new 1979 policy interpretation) may now sue the school or college directly. The *Cannon* case thus provides a second avenue in the pursuit of equality in athletic programs.

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 71417.
[27] *Id.*
[28] *Id.*

[29] *Id.* at 71417–18.
[30] *Id.* at 71418.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] 99 S. Ct. 1946 (May 14, 1979).

In addition, the Department of Justice has recently expressed its willingness to assist women and girls in Title IX athletic disputes by filing a motion to intervene in a lawsuit against the University of Alaska.[37] The suit, *Pavey v. University of Alaska*, was filed in the U.S. District Court in Alaska on May 8, 1979 by three members of the 1978–79 basketball teamwho charged that the university was violating Title IX.[38] The Department of Justice's complaint in intervention, filed November 20, 1979, charged that the university gave women disproportionately less coaching and funding, including grants-in-aid, than it gave men. The complaint also charged that women received less money for travel and publicity and had to make do with old, mismatched uniforms when men were given new uniforms.[39] The intervention of the Department of Justice into this Title IX athletic suit indicates that this Department is concerned with sex discrimination, and its concern may provide a further incentive to voluntary compliance.

Since Title IX was enacted in 1972, women and girls have made considerable progress in participation rates and increased budget allocations, but they nevertheless have not achieved equal athletic opportunity. Increased attention to Title IX by concerned women's groups, the newly won right of individuals to sue directly over alleged Title IX violations, increased efforts of high schools and colleges to expand their women's programs, and vigorous administrative enforcement of Title IX will all help enhance women's athletic opportunities, so that the final hurdles in achieving equality may be cleared.

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[36] With the creation of the new Department of Education, enforcement of Title IX will be transferred to that agency. Department of Education Reorganization Act, Pub. Law 96–84 (93 Stat. 668) 1979.

[37] Motion of United States for Leave to Intervene as Plaintiff, Colleen Pavey v. The University of Alaska, C. A. No. A79–019 (D. Alaska, filed Jan. 18, 1979) (hereafter cited as Motion to Intervene).

[38] C.A. No 79–019 (D. Alaska, fiied Jan. 18, 1979).

[39] Motion to Intervene, at 3.

Table A1

Proportion of Girls and Boys in Interscholastic Athletics, by State 1978-79

State	Girls	Boys
Alabama	14.9%	85.1%
Alaska	38.3%	61.7%
Arizona	29.1%	70.9%
Arkansas	25.2%	74.8%
California	25.9%	74.1%
Colorado	38.0%	62.0%
Connecticut	33.9%	66.1%
Delaware	31.8%	68.2%
District of Columbia	41.4%	58.6%
Florida	32.4%	67.6%
Georgia	31.6%	68.4%
Hawaii	30.3%	69.7%
Idaho	33.7%	66.3%
Illinois	32.7%	67.3%
Indiana	32.1%	67.9%
Iowa	48.8%	51.2%
Kansas	43.8%	56.2%
Kentucky	33.9%	66.1%
Louisiana	23.6%	76.4%
Maine	42.2%	57.8%
Maryland	34.2%	65.8%
Massachusetts	34.1%	65.9%
Michigan	31.6%	68.4%
Minnesota	37.0%	63.0%
Mississippi	26.6%	73.4%
Missouri	32.6%	67.4%
Nebraska	37.1%	62.9%
Nevada	27.2%	72.8%
New Hampshire	37.7%	62.3%
New Jersey	26.0%	74.0%
New Mexico	41.2%	58.8%
New York	36.6%	63.4%
North Carolina	26.8%	73.2%
North Dakota	34.5%	65.5%
Ohio	29.4%	70.6%
Oklahoma	34.8%	65.2%
Oregon	27.9%	72.1%
Pennsylvania	32.8%	67.2%
Rhode Island	31.4%	68.6%
South Carolina	24.1%	75.9%
South Dakota	40.0%	60.0%
Tennessee	29.3%	70.7%
Texas	40.1%	59.9%
Utah	27.8%	72.2%
Vermont	42.5%	57.5%
Virginia	25.7%	74.3%
Washington	35.3%	64.7%
West Virginia	19.6%	80.4%
Wisconsin	32.6%	67.4%
Wyoming	32.6%	67.4%

Source: National Federation of State High School Associations, *Sports Participation Survey*, 1978. Proportion of boys and girls participating in Iowa was supplied by Project on Equal Education Rights, Washington, D.C., September, 1979.

TABLE A2

Number of High Schools Offering Interscholastic Athletics and Number of Participants 1978-79

Sport	Number of Schools of Offering Sports		Number of Participants	
	Boys	Girls	Boys	Girls[1]
Archery	39	116	431	1,769
Badminton	144	560	1,120	13,540
Baseball	13,391	[2]	431,989	242
Basketball	18,749	17,167	758,723	518,915
Bowling	791	569	9,086	7,021
Cross Country	9,831	3,814	204,365	45,318
Curling	4	0	159	0
Decathlon	204	0	1,100	0
Fencing	84	35	1,236	366
Field Hockey	11	1,739	308	66,174
Football	15,643	0	1,100,651	0
Golf	9,437	2,907	132,467	24,355
Gymnastics	1,279	3,604	29,943	79,017
Ice Hockey	578	0	24,659	0
LaCrosse	256	176	8,316	7,543
Pentathlon	52	59	75	100
Riflery	282	30	4,585	317
Skiing	344	370	9,936	8,529
Soccer	3,287	580	112,066	17,496
Softball	160	7,669	3,530	176,664
Swimming	3,824	3,401	102,730	83,766
Table Tennis	99	1	821	39
Tennis	8,846	7,960	167,474	144,673
Track & Field Indoor	1,434	747	55,864	25,983
Track & Field Outdoor	16,142	13,935	678,968	447,627
Volleyball	722	11,504	12,495	302,519
Water Polo	397	28	12,455	372
Weightlifting	45	13	1,760	351
Wrestling	9,532	0	338,228	0
Total Participants			4,207,329	1,972,347

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1. Excludes girls participating in Iowa.
2. Baseball is available to girls only in Massachusetts. Massachusetts does not publish the number of schools in which sports are available.

Source: National Federation of State High School Associations, *Sports Participation Survey*, 1978; and Iowa Girls' High School Athletic Union, *News*, May 1979, p.3. Data on Canada and the Philippines were subtracted from the totals in the *Sports Participation Survey*.

TABLE A3

Number of Two-Year Colleges Offering Intercollegiate Athletics to Men and Women 1977-78

Sport	Number of Colleges Men	Women
Baseball	379	0
Basketball	535	367
Bowling	43	39
Cross Country	155	37
Fencing	1	4
Field Hockey	0	33
Football	97	0
Golf	355	45
Gymnastics	12	24
Ice Hockey	23	0
Judo	7	0
Lacrosse	16	0
Rifle	5	0
Skiing	16	11
Soccer	126	0
Softball	0	204
Swimming	43	27
Tennis	369	244
Track & Field, Outdoor	174	70
Track & Field, Indoor	74	0
Volleyball	16	262
Wrestling	145	0

Source: National Junior College Athletic Association, "Sports Participation Survey," *1978-79 Handbook and Casebook*, 1978.

TABLE A4

Number of Colleges Offering Intercollegiate Athletics and Number of Participants 1976-77

Sport	Number of Colleges		Number of Participants	
	Men	Women	Men	Women
Archery	[1]	13	[1]	107
Badminton	[1]	41	[1]	605
Baseball	654	7	19,113	135
Basketball	715	649	14,683	10,859
Bowling	27	27	272	271
Crew	57	35	2,731	986
Cross Country	576	176	8,810	1,653
Fencing	76	79	1,416	899
Field Hockey	[1]	290	[1]	6,847
Football	475	[1]	41,551	[1]
Golf	620	132	6,713	1,068
Gynmastics	97	203	1,765	2,722
Ice Hockey	117	0	3,303	0
Lacrosse	143	87	4,919	2,539
Pistol	10	0	213	0
Rifle	74	14	1,021	75
Rugby	8	0	381	0
Sailing	31	23	1,272	296
Skiing	71	46	1,173	520
Soccer	435	[1]	13,458	[1]
Softball	6	317	110	6,310
Squash	19	14	462	199
Swimming	394	338	8,830	5,969
Tennis	655	582	7,635	7,127
Track & Field	533	314	20,063	5,831
Volleyball	42	544	803	9,356
Water Polo	48	[1]	975	[1]
Wrestling	379	[1]	8,712	[1]
Total number of participants			170,384	64,375

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1. Fewer than 5 colleges offered these sports and the data for colleges and participants were not reported.

Source: National Collegiate Athletic Association *The Sports and Recreational Programs of the Nation's Universities and Colleges: Report Number Five, Corrected Copy*, 1978, tables 1 and 3.

TABLE A5

Mean Number of Intercollegiate Sports for Women and For Men, By Size of Institution and Availability of Football 1973-74, 1977-78, 1978-79

		Women			Men	
Size of Institution[1]	1973-74	1977-78	1978-79	1973-74	1977-78	1978-79
SMALL (1-1000)						
No football (N=203)	0.7	2.3	2.7	3.5	4.2	4.0
Football (N= 84)	1.4	3.6	4.2	.3	7.4	7.3
Subtotal (N=287)	0.9	2.7	3.1	4.6	5.1	5.0
MED-SMALL (1001-2000)						
No football (N=151)	1.5	3.1	3.6	5.0	5.2	5.1
Football (N=157)	2.3	4.8	5.0	8.6	8.8	8.7
Subtotal (N=308)	1.9	4.0	4.3	6.8	7.0	7.0
MEDIUM (2001-5000)						
No football (N=122)	1.7	3.7	4.1	5.8	6.7	6.6
Football (N=154)	2.7	5.6	6.0	9.3	9.3	9.2
Subtotal (N=276)	2.3	4.8	5.2	7.8	8.2	8.0
MED-LARGE (5001-10,000)						
No football (N= 53)	3.1	5.9	6.2	8.3	8.0	7.7
Football (N=117)	3.9	6.6	6.9	9.9	9.8	9.6
Subtotal (N=170)	3.6	6.4	6.7	9.4	9.2	9.0
LARGE (10,001+)						
No football (N= 22)	3.6	6.0	6.4	8.1	9.1	8.9
Football (N=116)	6.5	8.5	8.6	11.0	10.6	10.7
Subtotal (N=138)	6.0	8.1	8.2	10.6	10.4	10.4
Subtotal						
No football (N=551)	1.5	3.3	3.7	5.0	5.6	5.4
Football (N=628)	3.4	5.9	6.2	9.3	9.3	9.2
TOTAL (N=1179)	2.5	4.7	5.0	7.3	7.5	7.4

[1] Number of full-time undergraduate students.

This table may be read as follows: In the 1978-79 season, small four-year colleges with enrollments of less than 100 students and which do not offer football have a mean of 2.7 sports for women and 4.0 sports for men.

Source: National Association of Collegiate Directors of Athletics, *Directory of College Athletics*, 1973-74, 1977-78, 1978-79.

TABLE A6

Percentage Change in the Number of Intercollegiate Sports Offered to Women and Men 1973-74 to 1978-79 and 1977-78 to 1978-79

	Women		Men	
Size of Institution[1]	**1973-74 to 1978-79**	**1977-78 to 1978-79**	**1973-74 to 1978-79**	**1977-78 to 1978-79**
SMALL (1-1000)				
No football	+285.7%	+17.4%	+14.3%	−4.8%
Football	+200.0%	+16.7%	—	−1.4%
MED-SMALL (1001-2000)				
No football	+140.0%	+16.1%	+ 2.0%	−1.9%
Football	+117.4%	+ 4.2%	+ 1.2%	−1.1%
MEDIUM (2001-5000)				
No football	+141.2%	+10.8%	+13.8%	−1.5%
Football	+122.2%	+ 7.1%	− 1.1%	−1.1%
MED-LARGE (5001-10,000)				
No football	+100.0%	+ 5.1%	− 7.2%	−3.8%
Football	+ 76.9%	+ 4.5%	− 3.0%	−2.0%
LARGE (10,001 +)				
No football	+ 77.7%	+ 6.7%	+ 9.9%	−2.2%
Football	+ 32.3%	+ 1.2%	− 2.7%	−0.9%
Subtotal				
No football	+146.7%	+12.1%	+ 8.0%	−3.6%
Football	+ 82.4%	+ 5.1%	− 1.1%	−1.1%
TOTAL	+100.0%	+ 6.4%	+ 1.4%	−1.4%

1. Number of full-time undergraduate students.

This table may be read as follows: At medium-small colleges the number of sports offered to women at institutions without football increased by 140.0 percent; they increased by 117.4 percent at institutions of that size with football.

Source: National Association of Collegiate Directors of Athletics, *Directory of College Athletics*, 1973-74, 1977-78, 1978-79.

TABLE A7

Differences Between Number of Intercollegiate Sports Offered to Men and Women
1973-74, 1977-78, 1978-79

Size of Institution[1]		1973-74	1977-78	1978-79
SMALL (1-1000)				
No football	(N = 203)	+400.0%	+ 82.6%	+48.1%
Football	(N = 84)	+421.4%	+105.6%	+73.8%
MED-SMALL (1001-2000)				
No football	(N = 151)	+233.3%	+ 67.7%	+41.7%
Football	(N = 157)	+273.9%	+ 83.3%	+74.0%
MEDIUM (2001-5000)				
No football	(N = 122)	+241.2%	+ 81.1%	+61.0%
Football	(N = 154)	+244.4%	+ 66.1%	+53.3%
MED-LARGE (5001-10,000)				
No football	(N = 53)	+167.7%	+ 35.6%	+24.2%
Football	(N = 117)	+153.8%	+ 48.5%	+39.1%
LARGE (10,000 +)				
No football	(N = 22)	+125.0%	+ 51.7%	+39.1%
Football	(N = 116)	+ 69.2%	+ 24.7%	+24.4%
Subtotal				
No football	(N = 551)	+223.3%	+ 69.7%	+45.9%
Football	(N = 628)	+173.5%	+ 57.6%	+48.4%
TOTAL	(N = 1179)	+192.0%	+ 59.6%	+48.0%

1. Number of full-time undergraduate students.

This table may be read as follows: In the 1978-79 season, small, four-year colleges with enrollments of less than 1000 not sponsoring football offered men 48.1 percent more sports than they offered women. Schools with football offered men 73.8 percent more sports than they offered women.

Source: National Association of Collegiate Directors of Athletics, *Directory of College Athletics*, 1973-74, 1977-78, 1978-9.

TABLE A8

Intercollegiate and Intramural Participation by Men and Women at NCAA Institutions 1966-67, 1971-72, 1976-77

Academic Year		Intercollegiate Men	Intercollegiate Women	Intercollegiate Total	Intramural Men	Intramural Women	Intramural Total
1966-67	Number	154,179	15,727	169,906	1,273,908	165,081	1,438,989
	Percent	87.5%	12.5%	100.0%	88.8%	11.2%	100.0%
1971-72	Number	172,447	31,852	204,299	1,676,995	276,167	1,953,162
	Percent	84.4%	15.6%	100.0%	85.9%	14.1%	100.0%
Percent Changed		+11.8%	+102.5%	+20.2%	+31.6%	+67.3%	+35.7%
1976-77	Number	170,384	64,375	234,759	2,067,167	576,648	2,643,815
	Percent	72.6%	27.4%	100.0%	78.2%	21.8%	100.0%
Percent Changed		−1.2%	+102.1%	+14.9%	+23.3%	+108.8%	+35.4%

Source: Comments of the National Collegiate Athletic Association on the Proposed Policy Interpretation of the Department of Health, Education, and Welfare Regarding Application of its Title IX Regulation to Intercollegiate Athletics, p. 11.

Appendix B.1

HEW's Jurisdiction under Title IX

The courts have not specifically considered the scope of HEW's jurisdiction over athletics under Title IX. Some commentators have suggested that HEW may not regulate the athletics program of a federally-assisted school unless the athletics program itself receives direct aid.[1] These commentators point out that Title IX itself refers to "programs or activities receiving Federal financial assistance,"[2] while the HEW regulations purport to cover any program which "receives or benefits from" such aid.[3]

HEW has consistently asserted that it may regulate all education programs or activities of a recipient of Federal assistance. In testimony given during congressional hearings on the Title IX regulations, Secretary Caspar Weinberger expressly stated that this was the Department's approach:

> In other words, if the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in Title VI, and that is why we use this interpretation in Title IX.[4]

The Congress declined to limit or reject HEW's regulations despite opportunities to do so,[5] and the regulations went into effect on July 21, 1975.[6]

The Department of Health, Education, and Welfare and most commentators[7] continue to support the broad reach of the Title IX regulations, pointing out that discrimination in one portion of an educational system often "infects" other portions, causing them to become discriminatory. Regulation of such "infected" programs was implicitly approved in the related context of Title VI by one Federal appellate court.[8] In addition, proponents of the regulations point out that nondirectly funded programs such as athletics serve the same group of student beneficiaries and are administered by the same officials responsible for the nondiscriminatory operation of directly funded programs. Regulation of both types of programs within a recipient institution promotes the congressional intent, expressed in Title IX, to provide educational equity to students of both sexes.

No court has yet confronted the question whether HEW's jurisdiction under Title IX is institution-wide, limited in its reach to programs that directly receive Federal funds, or dependent upon a showing of "infection." In 1976 the National Collegiate Athletics Association (NCAA) challenged the validity of the athletics regulations on the ground that school sports programs are not usually directly supported by Federal funds.[9] This assertion was vigorously contested by HEW, the Association for Intercollegiate Athletics for Women, and the National Education Association, among others. The NCAA's claim was dismissed in 1978 for lack of standing and ripeness, without a decision on the merits.[10] Other challenges to HEW's regulations have involved employment practices, concluding that Title IX did not give HEW authority to regulate employment practices by recipient institutions except where the primary purpose of the Federal aid was to provide employment.[11] However, these cases involved HEW's extension of protections to faculty and staff members and not to students, who are the primary beneficiaries of most Federal aid to education.[12] As such, these cases do not provide a resolution to the question of HEW's jurisdictional reach in other areas.

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[1] *See, e.g.*, Kuhn, Title IX: Employment and Athletics are Outside HEW's Jurisdiction, 65 Geo. L.J. 49 (1976).

[2] 20 U.S.C. §1681 (1977).

[3] 45 C.F.R. §86.11 (1979).

[4] Hearing on Sex Discrimination Regulations Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st sess. 484–85 (1975).

[5] H. Con. Res. 311, 94th Cong., 1st sess. (1975) sought to disapprove the provisions on intercollegiate athletics; H. Con. Res. 310, 94th Cong., 1st sess. (1975) would have disapproved the entire regulation. Both were defeated.

[6] 40 *Fed. Reg.* 21428 (June 4, 1975), now codified at 45 C.F.R. Part 86 (1979).

[7] *See, e.g.*, note, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 Yale L.J. 1254 (1979); Cox, Intercollegiate Athletics and Title IX, 46 Geo. Wash. L. Rev. 34 (1977).

[8] Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068, 1078–79 (5th Cir. 1969).

In sum, neither Congress nor the courts has embraced the assertion that Title IX's mandate of equal opportunity for all students, male and female, is applicable only within those specific programs receiving direct assistance from the Federal Government. The Department of Health, Education, and Welfare's interpretation of its regulatory responsibilities is theregore presumed to be valid throughout this monograph.[13]

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[9] N.C.A.A. v. Califano, 444 F. Supp. 425 (D.Kans. 1978).

[10] *Id.*

[11] *See, e.g.*, Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied* —U.S.—(Nov. 26, 1979), and cases cited therein.

[12] One court stated, "the district court held that [Title IX] does not deal with sex discrimination against employees of educational institutions , but was enacted to prohibit discrimination against students who are the intendend beneficiaries of federal financial assistance to education. We agree and affirm." *Id.* at 583.

[13] The interpretation of a statute by the agency charged with the responsibility of setting its machinery in motion is accorded great deference by the courts. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Chemehuevi Tribe v. Federal Power Commission, 420 U.S. 395 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Appendix C.1
HEW's Regulations

federal register

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PART II

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

■

NONDISCRIMINATION ON BASIS OF SEX

Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

1

On June 20, 1974, the Office for Civil Rights of the Department of Health, Education, and Welfare gave notice of proposed rulemaking to the effect that it intended to add Part 86 to the Departmental regulation to effectuate title IX of the Education Amendments of 1972 (20 U.S.C. sections 1681 et seq.), except sections 904 and 906 thereof (20 U.S.C. 1684 and 1686), with regard to Federal financial assistance administered by the Department (39 FR 22228). Title IX provides that "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain exceptions. Title IX is similar to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) except that title IX applies to discrimination based on sex, is limited to education programs and activities, and includes employment. Title IX is also similar to, but independent of, sections 799A and 845 of the Public Health Service Act which, in effect, proscribe discrimination on the basis of sex in admissions to certain health training programs (42 U.S.C.. 295h–9 and 42 U.S.C. 298b–2).

2

Interested persons were given until October 15, 1974, in which to submit written comments, suggestions, or objections regarding the proposed regulation. The Department received over 9700 comments, suggestions or objections and, after consideration of all relevant matter presented by interested persons, the regulation as proposed is hereby adopted, subject to changes as reflected herein.

3

EFFECTIVE DATE

This regulation has been signed by the Secretary of Health, Education, and Welfare and approved by the President. It will be transmitted to Congress pursuant to section 431(d)(1) of the General Education Provisions Act, as amended by section 509(a)(2) of the Education Amendments of 1974 (Pub. L. 93–380, 88 Stat. 567). The regulation will become effective on July 21, 1975.

4

SUMMARY OF REGULATION

Subpart A of this regulation (§§ 86.1 through 86.9) includes definitions and provisions concerning: remedial and affirmative actions, self-evaluation, required assurances, dissemination of information policies, and other general matters related to discrimination on the basis of sex. The Subpart also explains the effect of state and local laws and other requirements.

5

Subpart B (§§ 86.11 through 86.17) describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the regulation. It also includes exemptions as to the admissions practices of certain educational institutions and an exemption as to the membership practices of social fraternities and sororities, the Boy Scouts, Girl Scouts, Camp Fire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. This Subpart defines "admissions," and describes certain educational institutions which are eligible to submit transition plans designed to convert their single-sex admissions processes to non-discriminatory processes over a stated period of time not to exceed seven years from the date of enactment of title IX (*i.e.*, by June 24, 1979). The exemptions for the admissions practices of certain educational institutions are set forth in § 901(a) of title IX as originally passed by Congress in Pub. L. 92–318. The exemption for the membership practices of the aforementioned youth organizations was inserted into title IX by § 3(a) of Pub. L. 93–568, signed by the President on December 31, 1974.

6

Subpart C (§§ 86.21 through 86.23) sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences, including requirements concerning recruitment of students. The regulatory requirements regarding treatment of students and employment (Subparts D and E) are applicable to all educational institutions receiving Federal financial assistance, including those whose admissions are exempt under Subpart C.

7

Subpart D (§§ 86.31 through 86.42) sets forth the general rules with respect to prohibited discrimination in educational programs and activities. The specific subject matter covered in Subpart D includes discrimination on the basis of sex in academic research, extracurricular and other offerings, housing, facilities, access to programs and activities, financial and employment assistance to students, health and insurance benefits for students, physical education and instruction, athletics, discrimination based on the marital or parental status of students and portions of classes dealing with sex education. The regulation explicitly does not affect the use of particular textbooks or curricular materials.

8

Subpart E (§§ 86.51 through 86.61) sets forth the general rules with respect to employment in educational programs and activities. The specific subject matters covered are: discrimination on the basis of sex in hiring and employment criteria, recruitment, compensation, job classification and structure, promotions and terminations, fringe benefits, consideration of marital or parental status, leave practices, advertising, and pre-employment inquiries as to marital or parental status. It also includes provisions for exemptions where sex is a bona fide occupational qualification.

9

Subpart F (§ 86.71) sets forth the interim procedures which will govern the implementation of the regulation by incorporating by reference the Department's procedures under title VI of the Civil Rights Act of 1964.

SCOPE OF APPLICATION

10

Section 86.11, in Subpart B, provides that the regulation applies "to each education program or activity which receives or benefits from Federal financial assistance" administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that the education functions of a school district or college include any service, facility, activity or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination; *see Brenden v. Independent School District 742*, 477 F. 2d 1292 (8th Cir. 1973).

11

Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found." The interpretation of this provision in title IX will be consistent with the interpretation of similar language contained in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they "are infected by a discriminatory environment * * *" *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F. 2d 1068, 1078–79 (5th Cir. 1969).

A more detailed discussion of various sections in each of the Subparts of the title IX regulation is set forth in the following paragraphs. In certain cases, major issues and the reasons for the final language are discussed.

SUBPART A—CHANGES

13

Section 86.1—The statement of purpose is amended by adding the words "whether or not such program or activity is offered or sponsored by an educational institution as defined in this part."

14

Paragraph 86.2(a)—The definition of "title IX" as used in the regulation is amended by adding "except §§ 904 and 906 thereof." The U.S. Code citation has been appropriately amended to reflect this change.

15

Paragraph 86.2(j)—The definition of "local education agency" is amended to include the following parenthetical abbreviation: "L.E.A."

16

Section 86.3—Remedial and affirmative action and self-evaluation. Paragraph (a) of this section is amended to read as follows:

> If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

17

Paragraph (b) of this section is amended by adding the sentence "Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246."

In addition, paragraphs (c) and (d) of this section have been added. Paragraph (c) requires recipients within a year of the effective date of the regulation to evaluate their policies and practices and the effects thereof in terms of the requirements of the regulation, to modify any of these polices and practices which do not or may not meet the requirements of the regulation, and to take appropriate remedial action to eliminate the effects of any discrimination which resulted or may have resulted from adherence to them. Paragraph (d) requires that the recipient maintain for at least three years from completion of the evaluation made pursuant to paragraph (c) a description of any modifications made and any remedial actions taken pursuant to paragraph (c).

18

Section 86.4(a)—The general description of assurances required is amended to add the following:

> An assurance of compliance with this Part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

19

Paragraph 86.6(a)—The paragraph concerning the effect of this regulation on other Federal provisions is amended to add the words "and do not alter" immediately prior to the word "obligations" in the proposed regulation.

20

Section 86.8—The section concerning designation of a responsible employee is amended as follows: The section as it appeared in the proposed regulation is redesignated as paragraph 86.8(a) and is amended by adding, at the end of the section as it appeared in the proposed regulation, the sentence: "The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph." A second paragraph designated paragraph 86.8(b) is added to read:

> (b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this Part.

21

Section 86.9—The section on dissemination of policy has been amended as follows: Subparagraph 86.9(a)(1) is amended by adding the words "and parents of elementary and secondary students" following the word "students," and by adding the words "and all unions or professional organizations holding collective bargaining or professional agreements" before the words "with the recipient."

ANALYSIS

22

Although a number of changes were made in Subpart A, most of these changes may be viewed as clarifications rather than as substantive alterations. One substantive change was made in § 86.3 where two new paragraphs concerning self-evaluation have been added. The Secretary believes that many of the discriminatory policies and practices now adhered to continue largely because the institutions responsible for them are unaware of their existence. Accordingly, the Secretary believes that the requirement that recipients conduct an initial inquiry into their activities will enable them to identify and to eliminate much discrimination without the intrusion of the Federal government. In addition, where a compliance review reveals noncompliance, the Department will be able to take into account in determining necessary corrective action to be taken by a recipient the actions already being taken by the recipient to further equal opportunity and to achieve full compliance with title IX and the regulation pursuant to their self-evaluation.

An additional substantive change was made in § 86.8 where the regulation now requires recipients to establish grievance procedures (§ 86.8(b)). The Secretary believes that the establishment of grievance procedures by recipients will facilitate compliance and prompt correction of complaints with resort to Federal involvement. The regulation leaves up to the recipient the choice of having one central grievance procedure or of establishing individual procedures on different campuses if that is appropriate.

23

Other than as noted above, the content of Subpart A remains substantively close to that in the proposed rule. § 86.2 is especially important since it provides definitions applicable throughout the regulation. Of particular note is § 86.2(o) which provides that where an educational institution is composed of more than one school, department or college, admission to which is independent of admission to any other component, each such school, department or college is considered as a separate unit for the purposes of determining whether its admissions are covered by the regulation. Thus, if a private institution is composed of an undergraduate and a graduate college, admissions to the undergraduate college are exempt (see discussion under Subpart B below), but admissions to the graduate school are not.

24

Paragraph 86.3(a) requires remedial action to overcome the effects of previous discrimination based on sex which has been found or identified in a Federally assisted education program or activity. Remedial action pursuant to paragraph 86.3(a) is restricted to those areas of a recipient's education program or activity which are not exempt from coverage. Paragraph 86.3(b) permits, but does not require, affirmative efforts to overcome the effects of conditions which have resulted in limited participation in all or part of a recipient's education program or activity by members of either sex. Moreover, the affirmative efforts referred to in paragraph 86.3(b) do not alter any obligations which a recipient may have as a Federal contractor pursuant to Executive Order 11246.

25

Section 86.4 requires each recipient of Federal financial assistance to submit to the Director an assurance that each of its education programs and activities receiving or benefiting from such assistance will be administered in compliance with the regulation. Such an assurance will be considered unsatisfactory if, at any time after it is given, the recipient fails to take any remedial action found necessary to correct discrimination or the effects thereof.

SUBPART B—CHANGE.

26

Section 86.12 is amended as follows: Paragraph 86.12(b) concerning the claiming of an exemption based on religion is amended to read:

> (b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this Part which conflict with a specific tenet of the religious organization.

27

Sections 86.14 through 86.16 are redesignated as §§ 86.15 through 86.17. A new § 86.14 is added dealing with membership practices of social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls and certain voluntary youth organizations. A new paragraph 86.15(a), reflecting the specific language of subparagraph 901(a)(2) of the Statute, is added specifying that the regulation does not apply to the admissions practices of educational institutions prior to June 24, 1973, which is one year from the date of enactment of title IX.

ANALYSIS

28

Three changes were made in Subpart B of which two might be considered substantive: The procedure for obtaining an exemption from the coverage of title IX because of conflict between the statutory requirements and the religious tenets of a recipient or its controlling organization have been modified and simplified. An educational institution now need only submit a statement by its highest ranking official identifying the provisions of the regulation which conflict with the tenets of the religious organization involved. The most notable substantive change in Subpart B, however, is the addition of a new § 86.14 which essentially incorporates the provisions of the recently enacted "Bayh Amendment" to title IX. The amendment, which is found at § 3 of Pub. L. 93–568, exempts from the requirements of title IX and, hence, of this regulation, the membership policies and practices of certain organizations which, though educational in nature or assisted by an education institution, have traditionally restricted their membership to members of one sex. It is important to note that, with respect to fraternal organizations, both the amendment and the regulation limit their exemption to fraternties and sororities of a social nature. Thus, membership policies of business and other professional fraternities and sororities may be subject to coverage either if they themselves receive Federal financial assistance in connection with an education program or activity or if they fall within the ambit of subparagraph 86.31(b)(7) under which recipients are prohibited from providing significant assistance to agencies, organizations or persons which discriminate on the basis of sex.

29

Apart from the changes noted immediately above, Subpart B remains substantively the same as it appeared in the proposed regulation. Section 86.12 provides that the regulation does not apply to religiously controlled institutions to the extent that such application would be inconsistent with the religious tenets of the controlling organization. Section 86.13 of the regulation provides that all public and private military schools which are recipients of Federal financial assistance, whether secondary or postsecondary, are exempt from coverage. Neither the statute nor the regulation applies to United States military and merchant marine academies since these schools are Federal entities rather than recipients of Federal assistance.

30

The statute covers admissions in only certain institutions: vocational, professional, graduate, and public undergraduate institutions, except such of the latter as from their founding have been traditionally and continually single-sex. The admissions policies of private undergraduate institutions are exempt. Under the statute and § 86.15, the admissions requirements do not apply, in general, to admissions to public or private preschool, elementary and secondary schools. Because the statute mandates such coverage as to vocational schools, however, admission to public or private vocational schools, whether at the junior high school, high school or post-secondary level, is covered by paragraph 86.15 (c) and must be nondiscriminatory. With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to a first degree in fields such as teaching, engineering, and architecture at such private colleges will be exempt under paragraph 86.15(d). A number of comments were received urging the Secretary to change his interpretation of the statute in this area. Even after reassessing the Department's position on this issue, the Secretary believes that Congress did not address the overlap between the term "professional" and the term "undergraduate." Thus, the Secretary remains convinced that, while that section of the statute pertaining to admissions might be read as including professional degrees wherever they are offered, the statute can also be read as stating that admissions to private undergraduate schools were to be totally exempt. The exemption in paragraph 86.15 (d) for admissions to public traditionally and continually single-sex undergraduate institutions will affect only a few institutions. Likewise, § 86.16 of the regulation, concerning transition by single-sex institutions whose admissions are covered by the statute into institutions with nondiscriminatory admissions practices, will affect relatively few institutions.

SUBPART C—CHANGES

31

Section 86.21—Subparagraph 86.21(b) (2) is amended to include the words "and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable" following the paragraph as it appeared in the proposed regulation. That section is further amended by omitting the words "successful completion of" and inserting the words "success in."

32

Subparagraphs 86.21(c) (2) and (3) are amended by deleting the words "miscarriage, abortion" and inserting in lieu thereof the words "termination of pregnancy."

33

Subparagraph 86.21(c)(4) is amended by deleting the term "Ms."

34

Section 86.23—Paragraph 86.23(a) is amended to read as follows:

> (a) *Nondiscriminatory recruitment.* A recipient to which this Subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

ANALYSIS

35

Neither of the two changes in Subpart C is substantive. The amendment to subparagraph 86.21(b)(2) clarifies a principle which provoked some confusion in the comments.

Both that change and the revision of paragraph 86.23(a) reflect an effort to conform the provisions of the regulations dealing with students and those dealing with employees. Apart from these changes, the substance of Subpart C remains unchanged and generally prescribes (subject to the appropriate admissions exemptions) requirements for nondiscrimination in recruitment and admission of students to education programs and activities. In addition to a general prohibition of discrimination in paragraph 86.21(a), the regulation delineates, in paragraph 86.21(b), specific prohibitions based on sex relating to such practices as ranking of applicants, application of quotas, and administration of tests or selection criteria. Use of tests for admission which are shown to have a disproportionately adverse effect on members of one sex must be shown validly to predict success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect must be shown to be unavailable (subparagraph 86.21(b)(2)). Further, in connection with this prohibition, § 86.22 of the regulation forbids a recipient from giving preference to applicants on the basis of their attendance at particular institutions if the preference results in discrimination on the basis of sex. Such preferences may be permissible under that section, however, if the granting institution can show that the pool of applicants eligible for such preferences includes roughly equivalent numbers of males and females, or it can show that the total number of applicants eligible to receive preferences is insignificant in comparison with its total applicant pool.

36

Specific prohibitions in Subpart C also forbid applying rules concerning such matters as marital or parental status in a manner which discriminates in admissions on the basis of sex (subparagraph 86.21(c)(1)). Subparagraph 86.21(c)(2) prohibits discrimination on the basis of pregnancy and related conditions, and subparagraph 86.21(c)(3) provides that recipients shall treat disabilities related to such conditions in the same manner and under the same policies as any other temporary disability or physical condition is treated. Finally, in addition to the provisions of § 86.23 discussed above, a recipient may not, under paragraph 86.23(b), recruit primarily or exclusively at institutions the student bodies of which are exclusively or predominantly single-sex if the effect of such recruitment efforts is to discriminate on the basis of sex.

SUBPART D—CHANGES

37

Section 86.31, concerning education programs and activities, is amended as follows:

38

Subparagraph 86.31(b)(6) is amended by adding after the word "behavior" the word "sanctions."

39

Subparagraph 86.31(b)(6) is amended by adding after the word "applicant" the words "including eligibility for in-state fees and tuition."

40

Subparagraph 86.31(b)(7) is amended to read as follows:

(b)(7) aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

Paragraph (c) is redesignated as paragraph (d) and a new paragraph (c) is inserted to read as follows:

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution: *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

41

Subparagraph 86.31(d)(2)(i) is amended by deleting the word "insure" appearing in the second line of the proposed regulation and substituting therefor the words "assure itself."

42

Subparagraph 86.32(c)(2) is amended after the word "students" in line 5 of the paragraph as it appeared in the proposed regulation to read as follows:

shall take such reasonable action as may be necessary to assure itself that such housing * * *

The remainder of the paragraph is unchanged.

43

Paragraph 86.34(a) is redesignated as § 86.34 and is amended further by adding six subparagraphs containing language:

(a) Providing adjustment periods with respect to classes and activities in physical education;

(b) Allowing grouping of students in physical education classes and activities by ability;

(c) Allowing separation of students by sex within physical education classes and activities during participation in contact sports;

(d) Requiring use of standards for measuring skill or progress in physical education classes which do not adversely affect members of one sex;

(e) Allowing portions of classes in elementary and secondary schools which deal exclusively with human sexuality to be conducted separately for boys and girls; and

(f) Allowing recipients to offer a chorus or choruses composed of members of one sex or predominantly composed of members of one sex if those choruses are based on vocal range or quality.

44

Paragraph 86.34(b) is redesignated as § 86.35 and retitled "Access to schools operated by L.E.A.s."

45

Paragraph 86.34(c) is redesignated as § 86.36 to read as follows:

§ 86.36 *Counseling and use of appraisal and counseling materials.*

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds tht the enrollment of a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

46

Paragraph 86.35(a) is redesignated as § 86.37 and the new section includes four paragraphs which include language:

(a) Generally prohibiting recipients from limiting eligibility for or providing different financial assistance to students on the basis of sex or from assisting outside organizations or persons which so discriminate in providing assistance, and from applying any rules or assisting in the application of any rules which treat members of one sex differently from members of the other sex on the basis of marital or parental status;

(b) Specifically allowing recipients to administer or assist in administration of sex-restrictive scholarships, fellowships or other forms of financial assistance established under a domestic or foreign will, trust, bequest or other similar instrument, if the overall administration is nondiscriminatory;

(c) Requiring the provisions of reasonable opportunities to receive athletic scholarships or grants-in-aid in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics, but allowing separate financial assistance for members of each sex provided in connection with separate athletic teams to the extent those teams are permitted under this regulation.

47

A new § 86.38 is added which is entitled "Employment assistance to students." The new section includes two paragraphs: Paragraph 86.35(b) becomes paragraph 86.38(a). Paragraph 86.35(c) is redesignated as paragraph 86.38(b).

48

Section 86.36 is redesignated as § 86.39 and is amended by adding at the end of the section as it appeared in the proposed regulation the sentence "However, any recipient which provides full coverage health service must provide gynecological care."

50

Paragraph 86.40(b) is amended to include five subparagraphs containing language:

1. Prohibiting discrimination against or exclusion of pregnant students from an education program or activity unless the student voluntarily requests to participate in a separate portion of the program or activity of the recipient;

2. Allowing a recipient to require a pregnant student to obtain a certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students

for other physical or emotional conditions;

3. Allowing recipients to offer separate instruction for pregnant students so long as admittance to such instruction is voluntary and provided such instruction is comparable to that offered to non-pregnant students;

4. Requiring recipients to treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom like any other temporary disability; and

5. Where a recipient does not maintain a temporary disability policy for the student or where a student does not qualify for leave, the recipient must treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom as a justification for a medical leave of absence at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

51

Paragraph 86.38(b), "Determination of student interest," and paragraph 86.38(c), "Affirmative efforts," of the proposed regulation have been deleted. Section 86.38 is redesignated as § 86.41 and is further amended to include language:

(a) Prohibiting discrimination by a recipient in any interscholastic, intercollegiate, club, or intramural athletics.

(b) Allowing separate teams when those teams are based on competitive skill or if they are in contact sports, but requiring that if a team is provided for members of one sex and not for the other in a non-contact sport and athletic opportunities for the sex for whom a team is not provided have previously been limited, members of that sex be allowed to try-out for the team offered. (Contact sports are defined for the purpose of the regulation.)

(c) Delineating some of the factors which will be considered in assessing whether a recipient has provided equal opportunity in the area of athletics.

(d) Allowing recipients an adjustment period during which they must work to comply with this section as quickly as possible but in no event allowing noncompliance to continue past one year from the effective date of the regulation in the case of elementary schools and in no case later than three years from the effective date of the regulation in the case of secondary and post-secondary schools.

52

A new § 86.42 is added concerning curriculum.

ANALYSIS

53

Several of the changes made in Subpart D are substantive in nature. The language in subparagraph 86.31(b)(7) has been amended in response to comments in order to clarify the Department's position when agencies, organizations or person not part of the recipient would be subject to the requirements of the regulation. Some of these "outside" organizations have been exempted from title IX with respect to their membership policies by a recent amendment to the Statute which was enacted in late 1974. This amendment is reflected, as already noted, in § 86.14 which exempts social fraternities and sororities, certain named groups such as the Girl Scouts and certain voluntary youth service organizations. Other groups, however, such as business and professional fraternities and sororities and honor societies continue to be covered. The regulation provides that if the recipient furnishes the "outside" agency or organization with "significant assistance," the "outside" agency or organization becomes so connected with the education program or activity of the recipient that any discriminatory policies or practices for which it is responsible become attributable to the recipient. Thus, such forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

Section 86.31(c) provides that where a sex-restricted scholarship, fellowship, or other such award established by a foreign will, trust or similar legal instrument but administered by a recipient constitutes a benefit to a student *already matriculating* at the recipient institution (*e.g.* the Rhodes Scholarship and the Clare Fellowship which provides opportunities for male students at domestic institutions to study abroad), the scholarship, fellowship or award may not be administered by the recipient unless the recipient administers, provides, or otherwise makes available, reasonable opportunities for similar studies for students of the other sex. Such benefits may be derived from either domestic or foreign sources.

54

The language in subparagraph 86.32(c)(2) has been changed in response to numerous comments which indicated concern that institutions which list or approve off-campus housing would be required to conduct on-site reviews of that housing which would result in a high cost to the institution and thereby militate against its continuing to aid students in finding off-campus housing. Under the regulation, on-site reviews, while permissible, need not be made as a routine matter by institutions, but the institution must take reasonable steps to assure itself that off-campus housing is comparable with respect to quality, quantity, and cost for members of each sex, given the proportion of individuals of each sex seeking such housing.

55

The changes in § 86.34 are also substantive. Subparagraph 86.34(a) requires physical education classes at the elementary school level to comply fully with the regulation as quickly as possible but to be in full compliance no later than one year from the effective date of the regulation in order to permit schools and local education agencies sufficient time to adjust schedules and prepare staff. It further requires physical education classes at the secondary and post-secondary levels to comply fully with the regulation as quickly as possible but to be in full compliance no later than three years from the effective date of the regulation. During such grace periods, while the recipient is making any necessary adjustments, it must ensure that physical education classes and activities which are separate are comparable for members of each sex. The recipient must be able to demonstrate that it is moving as expeditiously as possible within the prescribed time frame toward eliminating separate physical education classes. The adjustment period permitted at the secondary and post-secondary levels is significantly longer than that to be permitted at the elementary level because of the existence of wide skill differentials attributable to the traditionally lower levels of training available to girls in many schools.

56

Subparagraph 86.34(b) provides that ability grouping in physical education classes is permissible provided that the composition of the groups is determined objectively with regard to individual performance rather than on the basis of sex. Subparagraph 86.34(c) allows separation of students by sex within physical education classes during competition in wrestling, boxing, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact. Subparagraph 86.34(d), requiring the use of standards for measuring skill or progress in physical education which do not impact adversely on members of one sex, is intended to eliminate a problem raised by many comments that, where a goal-oriented standard is used to assess skill or progress, women will almost invariably score lower than men. For example, if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex. Accordingly, the appropriate standard might be an individual progress chart based on the number of push-ups which might be expected of that individual.

57

Subparagraph 86.34(e) which allows separate sessions in sex education for boys and girls at the elementary and secondary school level was published on July 12, 1974, as a clarification of the proposed regulation published in June (39 FR 25667). The final language has been slightly modified in response to comments indicating that the original language published on July 12, which referred generally to "sessions involving sex education" was somewhat vague. The present language more precisely identifies the material which may be taught separately as that dealing "exclusively with human sexuality." It should be stressed, of course, that neither the proposed regulation nor these final provisions require schools to offer sex education classes. Rather, the regulation specifically allows particular portions of any such classes that a school district elects to offer to be offered separately to boys and girls.

58

Numerous comments were received on the subject of physical education both in favor of and opposed to the position taken in the proposed regulation. Many commentators linked their opposition to coeducational physical education to their opposition to coeducational sex education classes. Some asked for separate but equal or comparable physical education. Others were opposed to the proposed regulation on the grounds of safety and supervision problems, and because they believed that physical differences between the sexes mandated differential treatment. Another group suggested that women would be discriminated against by losing in competition and receiving lower grades. Finally, some were opposed to any Federal involvement in local school matters.

59

The expanded section on counseling and use of appraisal and counseling materials was included in response to comments. Three amendments to the original language are of particular note: First, while the language which appeared in the proposed regulation treated only use of appraisal and counseling materials, paragraph 86.36(a) of the final regulation prohibits discriminatory counseling itself. Second paragraph 86.36(b) which incorporates some of the proposed language on materials also includes several further concepts. It allows use of different counseling materials based on sex if use of such materials is shown to be essential in eliminating sex bias. Recipients are required to use internal procedures for ensuring that their counseling materials are free from sex bias; and finally, where use of a particular test or instrument results in a classification which is substantially disproportionate in sexual composition, the recipient must take whatever action is necessary to assure itself that the disproportionate classification is not the result of a sex-biased test or of discriminatory administration of an unbiased test. Third, paragraph 86.36(c) requires that where a recipient educational institution finds that the composition of a class is disproportionately male or female, it must take steps to assure itself that the disproportion is not the result of sex-biased counseling or the use of discriminatory counseling or appraisal materials.

60

New § 86.37 concerning financial assistance to students has also been expanded over its earlier version as § 86.35 of the proposed regulation. The proposed regulation prohibited recipients from giving different types of financial assistance or different amounts of any form of such assistance on the basis of sex. The present provisions remain unchanged with respect to this requirement.

61

Numerous comments were received from colleges and universities claiming that the proposed paragraph 86.35(a) would cause to "dry-up" a substantial portion of funds currently available for student financial assistance made available through wills, trusts and bequests which require that award be made to members of a specified sex. As a result, a new paragraph 86.37(b) has been added which allows recipients to administer or assist in the administration of scholarships, fellowships or other financial assistance programs established pursuant to domestic or foreign wills, trusts, or similar legal instruments, which require that awards be made only to members of a specified sex, provided that the overall effect of such administration or assistance is nondiscriminatory. Thus, the regulation now requires institutions to award financial aid on the basis of criteria other than sex. Once those students eligible for financial aid have been identified, the financial aid office may award aid from both sex-restrictive and non-sex-restrictive sources. If there are insufficient sources of financial aid designated for members of a particular sex, the institution would be required to obtain the funds from other sources or to award less assistance from the sex-restrictive sources.

62

For example, if fifty students are selected by a university to receive financial assistance, the students should be ranked in the order in which they are to receive awards. If award is based on need, those most in need are placed at the top of the list; if award is based on academic excellence, those with the higher academic averages are placed at the top of the list. The list should then be given to the financial aid office which may match the students to the scholarships and other aid available, whether sex-restrictive or not. However, if after the first twenty students have been matched with funds, the financial aid office runs out of non-restrictive funds and is left with only funds designated for men, these funds must be awarded without regard to sex and not solely to men unless only men are left on the list. If both men and women remain on the list, the university must locate additional funding for the women or cease to give awards at that point.

The provision included in the proposed regulation exempting sex-restricted scholarships, fellowships, and other financial assistance programs established under foreign wills, trusts or similar legal instruments, has been removed. Where such scholarships, fellowships, and financial aid are administered by the recipient and constitute assistance to a student enabling him or her to *matriculate at the recipient institution*, they may be treated like similar forms of financial assistance established under domestic wills, trusts, and similar legal instruments or by acts of foreign governments, and paragraph 86.37(b) has been modified accordingly.

64

Subparagraph 86.37(c)(1) requires recipients to provide reasonable opportunities for athletic scholarships or grants-in-aid for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

65

Subparagraph 86.37(c)(2) retains the provision of paragraph 86.35(d) of the proposed regulation allowing sex-restrictive athletic scholarships provided as part of sex-restrictive athletic teams to the extent the operation of such teams is consistent with subparagraph 86.37(c)(1) and the athletics section of the regulation (§ 86.41).

66

Section 86.38 requires, as did its predecessor section, that assistance in making outside employment available to students, and that employment of students by a recipient must be undertaken in a nondiscriminatory manner.

67

Section 86.39, in addition to incorporating § 86.36 of the proposed regulation, requires that if full coverage health service is offered by recipients it must include gynecological care. This requirement should not be interpreted as requiring the recipient to employ a specialist physician. Rather, it is the Department's intent to require only that basic services in the gynecological field such as routine examinations, tests and treatment be provided where the recipient has elected to offer full health service coverage. Any limitations on health services offered cannot be based on sex.

68

The content of paragraph 86.40(a) is unchanged from the earlier proposal. The changes in paragraph 86.40(b) summarized above continue to require that pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom be treated like any other temporary disability. In response to many comments, the regulation now provides in subparagraph 86.40(b)(2) that a recipient may require a student who is or has recently been pregnant to obtain a doctor's certificate as to her ability to participate in the normal education program or activity so long as such a certificate is required of all students for other physical or emotional conditions. Subparagraph 86.40(b)(3) now allows a recipient to operate a portion of its program or activity separately for pregnant students. However, it prohibits mandatory assignment of students to such classes or schools and the instructional program offered separately must be comparable to that offered to nonpregnant students.

69

Section 86.41, the athletics section of the regulation, has been changed to meet some of the problems raised by the comments. Many comments received during the comment period indicate some confusion as to whether intramural programs are covered by this section. Since the intent is to cover intramurals, the phrase "interscholastic, intercollegiate, club or intramural athletics" has been substituted for the term "athletic programs" appearing in the first sentence of paragraph 86.38(a) of the proposed regulation.

70

Paragraph 86.41(a) provides that athletics must be operated without discrimination on the basis of sex. The Department continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of title IX even in the absence of Federal funds going directly to athletics. Except for certain specific exemptions not directly pertinent to athletics, paragraph 901(a) of title IX is virtually identical to paragraph 601(a) of ttitle VI of the Civil Rights Act of 1964. Since the language of title IX so closely parallels that of title VI, in the absence of specific Congressional indications to the contrary, the Department has basically interpreted title IX consistently with interpretations of title VI in similar areas. Under title VI, the courts have consistently considered athletics sponsored by educational institutions to be an integral part of that institution's education program or activity and, consequently, covered by title VI. See, for example, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971) and *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 891 (5th Cir. 1966), *affirmed en banc*. 380 F.2d 385 (5th Cir. 1967) *cert. denied sub nom. United States* v. *Caddo Parish Board of Education*, 389 U.S. 840 (1967).

71

Similarly, in cases wherein plaintiffs have challenged state and local rules prohibiting competition between men and women in high school athletics as being a violation of the equal protection clause of the Fourteenth Amendment, interscholastic sports have been specifically recognized as part of the education process. *Brenden* v. *Independent School District 742*, 477 F.2d 1292, 1297–1299 (8th Cir. 1973); *Bucha* v. *Illinois High School Association*, 351 F. Supp. 69, 74 (M.D. Ill. 1972); cf. *Hass.* v. *South Bend Community School Corporation*, 289 N.E. 2d 495, 499 (S. Ct. Ind. 1972) and *Reed* v. *Nebraska School Activities Association*, 341 F. Supp. 258, 262 (D. Neb. 1972).

72

In addition, § 844 of the Education Amendments of 1974 (Pub. L. 93–380) compels the Department to "[P]repare and publish * * * proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 * * * which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Thus, in light of the case law under title VI and the Fourteenth Amendment, and the Congressional mandate to cover intercollegiate athletics in § 844 of Pub. L. 93–380, the Department believes that coverage of athletics is mandated by title IX and that such coverage must be reflected in the regulation.

73

A substantial number of comments was received by the Department on the various issues raised concerning the athletic provisions of the proposed regulation. Numerous comments were received favoring a proposal submitted by the National Collegiate Athletic Association that the revenues earned by revenue-producing intercollegiate sports be exempted from coverage under this regulation. Other comments were submitted against this proposal.

74

The NCAA proposal was not adopted. There is no basis under the statute for exempting such sports or their revenues from coverage of title IX. An amendment to the Education Amendments of 1974 was introduced by Senator John Tower on the floor of the Senate specifically exempting from title IX revenue from revenue-producing intercollegiate athletics. 120 *Cong. Rec.* S 8488 (daily ed. May 20, 1974). The "Tower Amendment" was deleted by the conference committee and was, in effect, replaced by the so-called "Javits Amendment" which became § 844 of Pub. L. 93–380 mandating that the Department publish proposed title IX regulations whch would include "reasonable provisons" covering intercollegiate athletics.

75

In response to the comments, while paragraph 86.41(a) remains substantively the same as its predecessor, the remainder of the athletics section has been changed. Paragraph 86.38(b) of the proposed regulation required an annual determination of student interest by a recipient. This provision was widely misinterpreted as requiring institutions to take an annual poll of the student body and to offer all sports in which a majority of the student body expressed interest and abolish those in which there is no interest. The Department's intent, however, is to require institutions to take the interests of both sexes into account in determining what sports to offer. As long as there is no discrimination against members of either sex, the institution may offer whatever sports it desires. The "determination of student interest" provision has been removed. A new paragraph 86.41(c)(i) requires institutions to select "sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." In so doing, an institution should consider by a reasonable method it deems appropriate, the interests of both sexes.

Paragraph 86.38(c) of the proposed regulation required all recipients sponsoring athletic activities to take certain affirmative efforts with regard to members of the sex for which athletic opportunities have been limited notwithstanding the lack of any finding of discrimination. Since such a requirement could be considered "affirmative action" and was somewhat inconsistent with § 86.3, it has been deleted. However, "affirmative efforts" may still be required pursuant to paragraph 86.3(a) or may be undertaken on a voluntary basis pursuant to paragraph 86.3(b). Paragraph 86.41(b) permits separate teams for members of each sex where selection for the team is based on competitive skill or the activity involved is a contact sport. If, however, a team in a non-contact sport, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. For example, if tennis is offered for men and not for women and a woman wishes to play on the tennis team, if women's sports have previously been limited at the institution in question, that woman may compete for a place on the "men's" team. However, this provision does not alter the responsibility which a recipient has under § 86.41(c) with regard to the provision of equal opportunity. Under § 86.41(c)(i), recipients are required to select "sports and levels of competition which effectively accomodate the interests and abilities of members of both sexes." Thus, an institution would be required to provide separate teams for men and women in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes." This provision, of course, applies whether sports are contact or non-contact. As in the section on physical education, a contact sport is defined by using some examples and leaving the status of other sports to be determined on the basis of whether their purpose or major activity involves bodily contact.

76

Paragraph 86.41(c) retains the substance of paragraph 86.38(d) of the proposed regulation but has been expanded to provide more guidance on what factors the Department considers integral to providing equal opportunities in athletics. A list has been provided for the guidance of recipients of items which will be considered by the Office for Civil Rights in evaluating a recipient's interscholastic, intercollegiate, club or intramural athletics to determine if equal opportunity is available. These items will be considered whether or not a recipient sponsors separate teams, since inequality of opportunity may exist even where women participate on the same teams with men. The enumeration of items is not intended as a limitation on the items which the Department may deem pertinent for consideration during a particular compliance investigation or review.

77

As provided in the proposed regulation, the Department will not consider, as a *per se* failure to provide equal opportunity, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if such separate teams are offered or sponsored. Clearly, it is possible for equality of opportunity to be provided without exact equality of expenditure. However, any failure to provide necessary funds for women's teams may be considered by the Department in assessing equality of opportunity for members of each sex.

78

Finally, paragraph 86.41(d) has been added to provide a period of time similar to that allowed in the area of physical education for recipients to adjust their athletics offerings to comply with the requirements of the regulation. The Department will construe this section as requiring recipients to comply before the end of the adjustment period wherever possible.

79

The last substantive change in Subpart D is the addition of specific exemption of textbooks and curricular materials from the scope of the regulation. The new section explicitly states the Department's position that title IX does not reach the use of textbooks and curricular materials on the basis of their portrayals of individuals in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex. As stated in the preamble to the proposed regulation, the Department recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. There is no evidence in the legislative history that the proscription in title IX against sex discrimination should be interpreted as requiring, prohibiting or limiting the use of any such material. Normal rules of statutory construction require the Department, wherever possible, to interpret statutory language in such a way as to avoid potential conflicts with the Constitution. Accordingly, the Department has construed title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the Department in a position of limiting free expression in violation of the First Amendment.

80

The Department received a number of comments as well as one petition concerning discrimination in textbooks and curricular materials. The comments in favor of including coverage of textbooks and curricular materials came from national organizations, several college or university presidents or chancellors, several local school superintendents, several local organizations and interest groups, and a number of individuals. Comments opposing coverage were also submitted.

SUBPART E—CHANGES

81

Sections 86.41 through 86.51 are redesignated as §§ 86.51 through 86.61. Subparagraph 86.51(a)(4) is added providing as follows:

A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such a preference has the effect of discriminating on the basis of sex in violation of this Part.

82

Subparagraph 86.51(b)(2) is amended to add after the word "termination" the words "application of nepotism policies." Subparagraph 86.51(b)(6) is amended to delete the words "pregnancy leave" and to substitute therefor the words "leave for pregnancy, childbirth, false pregnancy, termination of pregnancy."

83

Section 86.53 is amended by deleting § 86.53(a) and substituting the following:

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

84

Section 86.54 is amended by deleting paragraphs 86.44 (b) and (c) as they appeared in the proposed regulation and by substituting a new paragraph 86.54(b) to read:

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

85

Paragraph 86.55(c) is amended by deleting the words "operate to." Section 86.57 is amended by deleting paragraphs 86.57 (b), (c), (d) and (e) and by substituting therefor language:

(1) Prohibiting discrimination in employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(2) Requiring treatment of pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom, to be treated as any other temporary disability for the purposes of leave, seniority and other benefits or services.

(3) Requiring, where a recipient does not maintain a leave policy or where an employee does not qualify for leave under such a policy because of inadequate longevity on the job, that the recipient shall treat an employee's pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom, as a justification for reasonable leave without pay with guaranteed reinstatement upon her return.

86

Section 86.90 is amended by deleting the term "Ms."

ANALYSIS

87

Before discussing the substantive changes in Subpart E, one explanation is needed regarding a section that was not changed. Subpart E generally follows the Sex Discrimination Guidelines (29 CFR Part 1604) of the Equal Employment Opportunity Commission (EEOC) and the regulations of the Office of Federal Contract Compliance (OFCC), United States Department of Labor (41 CFR Part 60). The EEOC administers title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the OFCC is responsible for the coordination and implementation of Executive Order 11246, as amended, which prohibits employment discrimination by Federal contractors. HEW is responsible for administration, pursuant to the OFCC regulations, of the Executive Order as to Federal contractors who are educational institutions. Virtually all recipients subject to this Part 86 are also subject to title VII and many are also subject to the Executive Order. Except in the area of fringe benefits, where Subpart E of the title IX regulation differs from the title VII Sex Discrimination Guidelines of the EEOC, an employer who complies with the title IX regulation will generally be complying both with title VII and the Executive Order. It should be emphasized, however, that nothing in the title IX regulation alters any responsibilities that an employer may have under the Executive Order or title VII. Paragraphs 86.3(b) and 86.6(a) of Subpart A have been modified to accentuate this point.

88

Accordingly, subparagraphs 86.56(b)(2) of Subpart E remains the same as subparagraph 86.46(b)(2) as it appeared in the proposed regulation and continues to follow the Executive Order regulations in requiring that fringe benefit plans provide either for equal periodic benefits to members of each sex or equal contributions by the employer for members of each sex (§ 86.39 imposes identical requirements for student benefit plans). The title VII Sex Discrimination Guidelines of the EEOC differ in that they prohibit payment of unequal periodic benefits on the basis of sex and preclude employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females. While the approach taken in the final regulation is felt to be the most reasonable at present, the Secretary recognizes the need to move toward some provision for equality in periodic benefits. In view of the potential problems associated with such a provision and also with the present inconsistency between the EEOC, OFCC and HEW approaches, the President has directed that a report be prepared by October 15 recommending a single approach.

89

Subparagraph 86.51(a)(1) makes it clear that the regulation applies to part-time employees. In the preamble to the proposed regulation it was stated that the section concerning fringe benefits (now § 86.56) would be interpreted as follows: It would require that where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full time employees, the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. Assuming the absence of discriminatory hiring practices on the part of an employer which channel female job applicants into part-time positions, it is questionable whether the Department has the authority to place the burden on an employer to demonstrate that failure to give part-time employees fringe benefits proportionate to those provided to full-time employees under the circumstances stated above is not discriminatory. Since discriminatory hiring practices which channel female job applicants into part-time jobs are clearly prohibited by subparagraph 86.51(a)(1), and because of the questions which may be raised as to the soundness of the interpretation given to § 86.56 in the preamble to the proposed regulation, the Department will assume the initial burden of demonstrating that a particular method of providing fringe benefits to part-time employees is discriminatory.

90

Subparagraph 86.51(a)(4) parallels paragraph 86.23(b) which concerns student recruitment. It prohibits recipients from granting preferences to employment applicants who are graduates of particular institutions, the student bodies of which are exclusively or predominantly of one sex, if the effect of such preferences results in discrimination on the basis of sex.

91

Paragraph 86.43(a) as it appeared in the proposed regulation required recipients who recruit for employment to make comparable efforts to recruit members of each sex. Paragraph 86.53(a) of the final regulation no longer requires comparable efforts but provides that a recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. This change recognizes that, under some circumstances, an employer may expend greater efforts to recruit members of one sex without discriminating against members of the other. For example, where a school district is located close to an all-female private undergraduate school, the district may have to expend greater efforts to recruit male teachers than it will have to use to recruit female teachers. However, where a recipient is presently discriminating on the basis of sex, or has in the past so discriminated, it shall take remedial action to recruit members of the sex discriminated against until the effect of such past discrimination no longer exists.

92

In response to the public comments, the language of paragraph 86.54(b) has been simplified over the language appearing in the proposed regulation to prohibit a recipient from enforcing any policy or practice which results in the payment of wages to members of one sex at a rate less than that paid to members of the other sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. This makes the title IX regulation consistent with the wording of the Equal Pay Act of 1963, Pub. L. 88-36, 29 U.S.C. paragraph 206(d), and will enable the Director to rely on the case law established under the Equal Pay Act to interpret and enforce paragraph 86.54(b).

93

Paragraphs 86.57 (b), (c) and (d) have been slightly modified from the earlier version to make it clear that a recipient cannot discriminate on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom and that such conditions and any temporary disabilities resulting therefrom must be treated by the recipient as any other temporary disability for all job-related purposes.

94

Paragraph 86.47(e) in the proposed regulation provided that an employee could not be required to commence leave related to pregnancy so long as her physician certified that she was capable of performing her duties, and that she must be allowed to resume work after such a leave no more than two weeks after her physician certifies that she is capable of doing so or, in the case of an employee who is a teacher, at the beginning of the first academic term after such certification is made. This section has been completely deleted from the final regulation since it is inconsistent with paragraph 86.57(b) which requires that all conditions related to pregnancy be treated as disabilities for job-related purposes. If a recipient requires that any employees suffering from a temporary disability be required to obtain a physician's certification that they are capable of continued work, then it may also require such a certification from pregnant employees. If a recipient requires all employees who take sick leave for a temporary disability to return to work after such leave two weeks after a physician certifies that such employees are capable of returning, then the same procedure must be utilized for pregnant employees. However, if none of these certifications is required for other temporary disabilities, none may be required of pregnant employees. Likewise, a recipient may not require pregnant employees to give advance notice of when they intend to commence sick leave unless such advance notice is also required of all other employees who intend to go on sick leave due to a temporary disability in cases where advance knowledge of the absence makes such notice possible.

95

Paragraph 86.60(a) prohibits pre-employment inquiries as to an applicant's marital status since such inquiries are frequently the foundation for discrimination against married women. Subparagraph 86.21(c)(4) in Subpart C contains a similar prohibition with regard to pre-admission inquiries. The proposed regulation proscribed inquiries into whether a job applicant was "Ms., Miss or Mrs." Since under paragraph 86.60(b) inquiries as to the sex of an applicant may be made so long as it is made of members of both sexes and is not used to discriminate, the inquiry proscribed in paragraph 86.60(a) as to whether an applicant is "Ms., Miss or Mrs." has been changed to delete the "Ms."

96

Finally, § 86.61 permits consideration of sex in making employment decisions where sex is a "bona fide occupational qualification." This section is retained in the final regulation to make the title IX regulation consistent with the Sex Discrimination Guidelines of the EEOC and with the OFCC regulations implementing Executive Order 11246. This section will be interpreted narrowly, consistent with interpretations already made under title VII of the Civil Rights Act of 1964 and the Executive Order.

SUBPART F

§ 86.71 Interim Procedures

For the purposes of implementing this Part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-6—80-11 and 45 CFR Part 81.

The Secretary has chosen to adopt the title VI procedures for use during the interim period between the effective date of this regulation and effectiveness of the final consolidated procedural regulation to simplify enforcement during that time and to avoid applying a different procedure for enforcement of requirements concerning discrimination based on race, color, or national origin from those based on sex. The Department is publishing, simultaneously with this final regulation, a proposed consolidated procedural regulation which will apply to most of the Department's civil rights enforcement activities. Comments on that proposal are solicited, as provided in the notice of proposed rulemaking, for 45 days.

QUESTIONS

Questions concerning the application or interpretation of this regulation should be addressed to the Regional Directors of the Office for Civil Rights whose addresses are as follows:

Region I—Mr. John G. Bynoe, RKO General Building, 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II—Mr. Joel Barkan, 26 Federal Plaza, Room 3908, New York 10007.

Region III—Mr. Dewey Dodds, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19101.

Region IV—Mr. William Thomas, 50 Seventh Street, N.E., Room 404, Atlanta, Georgia 30323.

Region V—Mr. Kenneth A. Mines, 309 W. Jackson Boulevard, 10th Floor, Chicago, Illinois 60606.

Region VI—Ms. Dorothy D. Stuck, 1114 Commerce Street, Dallas, Texas 75202.

Region VII—Mr. Taylor D. August, 12 Grand Building, 12th and Grand Avenue, Kansas City, Missouri 64106.

Region VIII—Mr. Gilbert D. Roman, Room 11037 Federal Building, 1961 Stout Street, Denver, Colorado 80202.

Region IX—Mr. Floyd L. Pierce, 760 Market Street, Room 700, San Francisco, California 94102.

Region X—Ms. Marlaina Kiner, 6101 Arcade Plaza Building, 1321 Second Avenue, Seattle, Washington 98101.

Dated: May 27, 1975.

CASPAR W. WEINBERGER,
Secretary

Dated: May 27, 1975.

Approved:

GERALD R. FORD,
President.

Part 86 is added to read as set forth below:

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

Subpart A—Introduction

Sec.
86.1 Purpose and effective date.
86.2 Definitions.
86.3 Remedial and affirmative action and self-evaluation.
86.4 Assurance required.
86.5 Transfers of property.
86.6 Effect of other requirements.
86.7 Effect of employment opportunities.
86.8 Designation of responsible employee and adoption of grievance procedures.
86.9 Dissemination of policy.

Subpart B—Coverage

86.11 Application.
86.12 Educational institutions controlled by religious organizations.
86.13 Military and merchant marine educational institutions.
86.14 Membership practices of certain organizations.
86.15 Admissions.
86.16 Educational institutions eligible to submit transition plans.
86.17 Transition plans.
86.18–86.20 [Reserved].

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

86.21 Admission.
86.22 Preference in admission.
86.23 Recruitment.
86.24–86.30 [Reserved].

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

Sec.
86.31 Education programs and activities.
86.32 Housing.
86.33 Comparable facilities.
86.34 Access to course offerings.
86.35 Access to schools operated by L.E.A.s.
86.36 Counseling and use of appraisal and counseling materials.
86.37 Financial assistance.
86.38 Employment assistance to students.
86.39 Health and insurance benefits and services.
86.40 Marital or parental status.
86.41 Athletics.
86.42 Textbooks and curricular material.
86.43–86.50 [Reserved].

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

86.51 Employment.
86.52 Employment criteria.
86.53 Recruitment.
86.54 Compensation.
86.55 Job classification and structure.
86.56 Fringe benefits.
86.57 Marital or parental status.
86.58 Effect of State or local law or other requirements.
86.59 Advertising.
86.60 Pre-employment inquiries.
86.61 Sex as bona-fide occupational qualification.
86.62–86.70 [Reserved].

Subpart F—Procedures

86.71 Interim procedures.

Subpart A—Introduction

§ 86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)

§ 86.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except §§ 904 and 906 thereof; 20 U.S.C. §§ 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Health, Education, and Welfare.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this Part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this Part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) "*Institution of graduate higher education*" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "*Institution of undergraduate higher education*" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "*Institution of professional education*" means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) "*Institution of vocational education*" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) "*Administratively separate unit*" means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "*Admission*" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "*Student*" means a person who has gained admission.

(r) "*Transition plan*" means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to subparagraph (c)(ii) and of any remedial steps taken pursuant to subparagraph (c)(iii).

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this Part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA,. Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1862, amending Sec. 901)

§ 86.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, § 86.16, § 86.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 Transition plans.

(a) *Submission of plans.* An institution to which § 86.16 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorised to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasise the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.18–86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) Specific prohibitions. (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24–86.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions*. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of anv rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution*. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient*. (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activtiy takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally*. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient*. (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing*. (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Sections 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling*. A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials*. A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) a recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this paragraph, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under subparagraph (b)(2)(i) of thic paragraph because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41 of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipent shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 86.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.43–86.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 86.54.

(b) *Prohibitions*. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal conrtibutions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 Marital or parental status.

(a) *General*. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy*. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability*. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave*. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements*. The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits*. A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 Pre-employment inquiries.

(a) *Marital status*. A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex*. A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat 373, 374; 20 U.S.C. 1681, 1682)

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of *sex* with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.62–86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-6—80-11 and 45 CFR Part 81.

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Appendix C. 2
HEW Memorandum

MEMORANDUM
TO

Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents

SUBJECT:

ELIMINATION OF SEX DISCRIMINATION IN ATHLETIC PROGRAMS

September, 1975

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE/Office for Civil Rights

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

September 1975

TO: Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents

FROM: Director, Office for Civil Rights

SUBJECT: Elimination of Sex Discrimination in Athletic Programs

Title IX of the Education Amendments of 1972 and the Departmental Regulation (45 CFR Part 86) promulgated thereunder prohibit discrimination on the basis of sex in the operation of most federally-assisted education programs. The regulation became effective on July 21, 1975.

During the forty-five day period immediately following approval by the President and publication of the regulation on June 4, 1975, concerns were raised about the immediate obligations of educational institutions to comply with certain sections of the Departmental Regulation as they relate to athletic programs. These concerns, in part, focus on the application of the adjustment period provision (86.41 (d)) to the various non-discrimination requirements, and additionally, on how educational institutions can carry out the self-evaluation requirement (86.3(c)).

This memorandum provides guidance with respect to the major first year responsibilities of an educational institution to ensure equal opportunity in the operation of both its athletic activities and its athletic scholarship programs. Practical experience derived from actual on-site compliance reviews and the concomitant development of greater governmental expertise on the application of the Regulation to athletic activities may, of course, result in further or revised guidance being issued in the future. Thus, as affected institutions proceed to conform their programs with the Department's regulation, they and other interested persons are encouraged to review carefully the operation of these guidelines and to provide the Department with the benefit of their views.

Basic Requirements

There are two major substantive provisions of the regulation which define the basic responsibility of educational institutions to provide equal opportunity to members of both sexes interested in participating in the athletics programs institutions offer.

Section 86.41 prohibits discrimination on the basis of sex in the operation of any interscholastic, intercollegiate, club or intramural athletic program offered by an educational institution. Section 86.37(c) sets forth requirements for ensuring equal opportunity in the provision of athletic scholarships.

These sections apply to each segment of the athletic program of a federally assisted educational institution whether or not that segment is the subject of direct financial support through the Department. Thus, the fact that a particular segment of an athletic program is supported by funds received from various other sources (such as student fees, general revenues, gate receipts, alumni donations, booster clubs, and non-profit foundations) does not remove it from the reach of the statute and hence of the regulatory requirements. However, drill teams, cheerleaders and the like, which are covered more generally as extracurricular activities under section 86.31, and instructional offerings such as physical education and health classes, which are covered under section 86.34, are not a part of the institution's "athletic program" within the meaning of the regulation.

Section 86.41 does not address the administrative structure(s) which are used by educational institutions for athletic programs. Accordingly, institutions are not precluded from employing separate administrative structures for men's and women's sports (if separate teams exist) or a unitary structure. However, when educational institutions evaluate whether they are in compliance with the provisions of the regulation relating to non-discrimination in employment, they must carefully assess the effects on employees of both sexes of current and any proposed administrative structure and related coaching assignments. Changes in current administrative structure(s) or coaching assignments which have a disproportionately adverse effect on the employment opportunities of employees of one sex are prohibited by the regulation.

Self-Evaluation and Adjustment Periods

Section 86.3(c) generally requires that by July 21, 1976, educational institutions (1) carefully evaluate current policies and practices (including those related to the operation of athletic programs) in terms of compliance with those provisions and (2) where such policies or practices are inconsistent with the regulation, conform current polices and practices to the requirements of the regulation.

An institution's evaluation of its athletic program must include every area of the program covered by the regulation. All sports are to be included in this overall assessment, whether they are contact or non-contact sports.

With respect to athletic programs, section 86.41 (d) sets specific time limitations on the attainment of total conformity of institutional policies and practices with the requirements of the regulation—up to one year for elementary schools and up to three years for all other educational institutions.

Because of the integral relationship of the provision relating to athletic scholarships and the provision relating to the operation of athletic programs, the adjustment periods for both are the same.

The adjustment period is not a waiting period. Institutions must begin now to take whatever steps are necessary to ensure full compliance as quickly as possible. Schools may design an approach for achieving full compliance tailored to their own circumstances; however, self-evaluation, as required by section 86.3 (c) is a very important step for every institution to assure compliance with the entire Title IX regulation, as well as with the athletics provisions.

Required First Year Actions

School districts, as well as colleges and universities, are obligated to perform a self-evaluation of their entire education program, including the athletics program, prior to July 21, 1976. School districts which offer interscholastic or intramural athletics at the elementary school level must immediately take significant steps to accommodate the interests and abilities of elementary school pupils of both sexes, including steps to eliminate obstacles to compliance such as inequities in the provision of equipment, scheduling and the assignment of coaches and other supervisory personnel. As indicated earlier, school districts must conform their total athletic program at the elementary level to the requirements of section 86.41 no later than July 21, 1976.

In order to comply with the various requirements of the regulation addressed to nondiscrimination in athletic programs, educational institutions operating athletic programs above the elementary level should:

(1) Compare the requirements of the regulation addressed to nondiscrimination in athletic programs and equal opportunity in the provision of athletic scholarships with current policies and practices;

(2) Determine the interests of both sexes in the sports to be offered by the institution and, where the sport is a contact sport or where participants are selected on the basis of competition, also determine the relative abilites of members of each sex for each such sport offered, in order to decide whether to have single sex teams or teams composed of both sexes. (Abilities might be determined through try-outs or by relying upon the

knowledge of athletic teaching staff, administrators and athletic conference and league representatives.)

(3) Develop a plan to accommodate effectively the interests and abilities of both sexes, which plan must be fully implemented as expeditiously as possible and in no event later than July 21, 1978. Although the plan need not be submitted to the Office for Civil Rights, institutions should consider publicizing such plans so as to gain the assistance of students, faculty, etc. in complying with them.

Assessment of Interests and Abilities

In determining student interests and abilities as described in (2) above, educational institutions as part of the self-evaluation process should draw the broadest possible base of information. An effort should be made to obtain the participation of all segments of the educational community affected by the athletics program, and any reasonable method adopted by an institution to obtain such participation will be acceptable.

Separate Teams

The second type of determination discussed in (2) above relates to the manner in which a given sports activity is to be offered. Contact sports and sports for which teams are chosen by competition may be offered either separately or on a unitary basis.

Contact sports are defined as football, basketball, boxing, wrestling, rugby, ice hockey and any other sport the purpose or major activity of which involves bodily contact. Such sports may be offered separately.

If by opening a team to both sexes in a contact sport an educational institution does not effectively accommodate the abilities of members of both sexes (see 86.41(c) (i)), separate teams in that sport will be required if both men and women express interest in the sport and the interests of both sexes are not otherwise accommodated. For example, an institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's team.

Equal Opportunity

In the development of the total athletic program referred to in (3) above, educational institutions, in order to accommodate effectively the interests and abilities of both sexes, must ensure that equal opportunity exists in both the conduct of athletic programs and the provision of athletic scholarships.

Section 86.41(c) requires equal opportunity in athletic programs for men and women. Specific factors which should be used by an educational institution during its self-evaluative planning to determine whether equal opportunity exists in its plan for its total athletic program are:

--the nature and extent of the sports programs to be offered (including the levels of competition, such as varsity, club, etc.);

--the provision of equipment and supplies;

--the scheduling of games and practice time;

--the provision of travel and per diem allowances;

--the nature and extent of the opportunity to receive coaching and academic tutoring;

--the assignment and compensation of coaches and tutors;

--the provision of locker rooms, practice and competitive facilities;

--the provision of medical and training facilities and services;

--the provision of housing and dining facilities and services;

--the nature and extent of publicity.

Overall Objective

The point of the regulation is not to be so inflexible as to require identical treatment in each of the matters listed under section 86.41(c). During the process of self-evaluation, institutions should examine all of the athletic opportunities for men and women and make a determination as to whether each has an equal opportunity to compete in athletics in a meaningful way. The equal opportunity emphasis in the regulation addresses the totality of the athletic program of the institution rather than each sport offered.

Educational institutions are not required to duplicate their men's program for women. The thrust of the effort should be on the contribution of each of the categories to the overall goal of equal opportunity in athletics rather than on the details related to each of the categories.

While the impact of expenditures for sex identifiable sports programs should be carefully considered in determining whether equal opportunity in athletics exists for both sexes, equal aggregate expenditures for male and female teams are not required. Rather, the pattern of expenditures should not result in a disparate effect on opportunity. Recipients must not discriminate on the basis of sex in the provision of necessary equipment, supplies, facilites, and publicity for sports programs. The fact that differences in expenditures may occur because of varying costs attributable to differences in equipment requirements and levels of spectator interest does not obviate in any way the responsibility of educational institutions to provide equal opportunity.

Athletic Scholarships

As part of the self-evaluation and planning process discussed above, educational institutions must also ensure that equal opportunity exists in the provision of athletic scholarships. Section 86.37(c) provides that "reasonable opportunities" for athletic scholarships should be "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

Following the approach of permitting separate teams, section 86.37(c) of the regulation permits the overall allocation of athletic scholarships on the basis of sex. No such separate treatment is permitted for non-athletic scholarships.

The thrust of the athletic scholarship section is the concept of reasonableness, not strict proportionality in the allocation of scholarships. The degree of interest and participation of male and female students in athletics is the critical factor in determining whether the allocation of athletic scholarships conforms to the requirements of the regulation.

Neither quotas nor fixed percentages of any type are required under the regulation. Rather, the institution is required to take a reasonable approach in its award of athletic scholarships, considering the participation and relative interests and athletic proficiency of its students of both sexes.

Institutions should assess whether male and female athletes in sports at comparable levels of competition are afforded approximately the same opportunities to obtain scholarships. Where the sports offered or the levels of competition differ for male and female students, the institution should assess its athletic scholarship program to determine whether overall opportunities to receive athletic scholarships are roughly proportionate to the number of students of each sex participating in intercollegiate athletics.

If an educational institution decides not to make an overall proportionate allocation of athletic scholarships on the basis of sex, and thus, decides to award such scholarships by other means such as applying general standards to applicants of both sexes, institutions should determine whether the standards used to award scholarships are neutral, i.e. based on criteria which do not inherently disadvantage members of either sex. There are a number of "neutral" standards which might be used including financial need, athletic proficiency or a combination of both. For example, an institution may wish to award its athletic scholarships to all applicants on the basis of need after a determination of a certain level of athletic proficiency. This would be permissable even if it results in a pattern of award which differs from the relative levels of interests or participation of men and women students so long as the initial determination of athletic proficiency is based on neutral standards. However, if such standards are not neutral in substance or in application then different standards would have to be developed and the use of the discriminatory standard discontinued. For example, when "ability" is used as a basis for scholarship award and the range of ability in a particular sport, at the time, differs widely between the sexes, separate norms must be developed for each sex.

Availability of Assistance

We in the Office for Civil Rights will be pleased to do everything possible to assist school officials to meet their Title IX responsibilities. The names, addresses and telephone numbers of Regional Offices for Civil Rights are attached.

Peter E. Holmes

DHEW REGIONAL OFFICES FOR CIVIL RIGHTS

Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont):
RKO General Building
Bulfinch Place
Boston, Massachusetts 02114
(617) 223-6397

Region II (New Jersey, New York, Puerto Rico, Virgin Islands):
26 Federal Plaza
New York, New York 10007
(212) 264-4633

Region III (Delaware, D.C., Maryland, Pennsylvania, Virginia, West Virginia):
Gateway Building
36th and Market Streets
Post Office Box 13716
Philadelphia, Pennsylvania 19104
(215) 596-6772

Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee):
680 W. Peachtree Street, N.W.
Atlanta, Georgia 30308
(404)881-3312

Region V (Illinois, Indiana, Minnesota, Michigan, Ohio, Wisconsin):
300 South Wacker Drive
Chicago, Illinois 60606
(312)353-2521

Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas):
1200 Main Tower Building
Dallas, Texas 75202
(214) 655-3951

Region VII (Iowa, Kansas, Missouri, Nebraska):
Twelve Grand Building
12th and Grand Avenue
Kansas City, Missouri 64106
(816) 374-2474

Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming):
Federal Building
1961 Stout Street
Denver, Colorado 80294
(303) 837-4345

Region IX (Arizona, California, Hawaii, Nevada):
14th Floor
100 Van Ness Avenue
San Francisco, California 94102
(415) 556-8586

Region X (Alaska, Idaho, Oregon, Washington):
Arcade Plaza Building MS 508
1321 Second Avenue
Seattle, Washington 98101
(206) 442-0473

Appendix C.3

HEW's Policy Interpretation

Federal Register / Vol. 44, No. 239 / Tuesday, December 11, 1979 / Rules and Regulations 71413

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6671

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation, in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

> The Secretary of (of HEW) shall prepare and publish * * * proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.[1]

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[1] The regulation specifically refers to club sports separately from intercollegiate athletics. Accordingly, under this Policy Interpretation, club

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Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- *Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:* Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- *Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):* Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- *Compliance in Meeting the Interests and Abilities of Male and Female Students:* Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either:

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilities an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditures patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department

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teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition.

published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

1. *The Regulation*—Section 86.37(c) of the regulation provides:

> [Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in * * * inter-collegiate athletics.[2]

2. *The Policy*—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. *Application of the Policy*—a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. *Definition*—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. *The Regulation*—The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics, "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

(1) [3]

(2) Provision and maintenance of equipment and supplies;

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training services and facilities;

(9) Provision of housing and dining services and facilities; and

(10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.[4]

2. *The Policy*—The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment"[5] to Title IX, which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation, nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

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[2] See also § 86.37(a) of the regulation.

[3] 86.41(c) (1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy Interpretation.

[4] See also § 86.41(a) and (b) of the regulation.

[5] Section 844 of the Education Amendments of 1974, Pub. L. 93–380, Title VIII, (August 21, 1974) 88 Stat. 612.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such diferences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—notably football and men's basketball—traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 86.3(b) of the regulation.

3. *Application of the Policy—General Athletic Program Components*—a. *Equipment and Supplies (§ 86.41(c)(2)).* Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The quality of equipment and supplies;

(2) The amount of equipment and supplies;

(3) The suitability of equipment and supplies;

(4) The maintenance and replacement of the equipment and supplies; and

(5) The availability of equipment and supplies.

b. *Scheduling of Games and Practice Times (§ 86.41(c)(3)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The number of competitive events per sport;

(2) The number and length of practice opportunities;

(3) The time of day competitive events are scheduled;

(4) The time of day practice opportunities are scheduled; and

(5) The opportunities to engage in available pre-season and post-season competition.

c. *Travel and Per Diem Allowances (§ 86.41(c)(4)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Modes of transportation;

(2) Housing furnished during travel;

(3) Length of stay before and after competitive events;

(4) Per diem allowances; and

(5) Dining arrangements.

d. *Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)).* (1) Coaching—Compliance will be assessed by examining, among other factors:

(a) Relative availability of full-time coaches;

(b) Relative availability of part-time and assistant coaches; and

(c) Relative availability of graduate assistants.

(2) Academic tutoring—Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(a) The availability of tutoring; and

(b) Procedures and criteria for obtaining tutorial assistance.

e. *Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)).*[6] In general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Training, experience, and other professional qualifications;

(b) Professional standing.

(2) Assignment of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

(a) Tutor qualifications;

(b) Training, experience, and other qualifications.

(3) Compensation of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Rate of compensation (per sport, per season);

(b) Duration of contracts;

(c) Conditions relating to contract renewal;

(d) Experience;

(e) Nature of coaching duties performed;

(f) Working conditions; and

(g) Other terms and conditions of employment.

(4) Compensation of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

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[6] The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 86.51–86.61 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E. Section 86.41(c)(6) of the regulation, however, authorizes the Department to consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes. It is on this section of the regulation that this Policy Interpretation is based.

(a) Hourly rate of payment by nature of subjects tutored;

(b) Pupil loads per tutoring season;

(c) Tutor qualifications;

(d) Experience;

(e) Other terms and conditions of employment.

f. *Provision of Locker Rooms, Practice and Competitive Facilities (§ 86.41(c)(7)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Quality and availability of the facilities provided for practice and competitive events;

(2) Exclusivity of use of facilities provided for practice and competitive events;

(3) Availability of locker rooms;

(4) Quality of locker rooms;

(5) Maintenance of practice and competitive facilities; and

(6) Preparation of facilities for practice and competitive events.

g. *Provision of Medical and Training Facilities and Services (§ 86.41(c)(8)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability of medical personnel and assistance;

(2) Health, accident and injury insurance coverage;

(3) Availability and quality of weight and training facilities;

(4) Availability and quality of conditioning facilities; and

(5) Availability and qualifications of athletic trainers.

h. *Provision of Housing and Dining Facilities and Services (§ 86.41(c)(9)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Housing provided;

(2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. *Publicity (§ 86.41(c)(10)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Availability and quality of sports information personnel;

(2) Access to other publicity resources for men's and women's programs; and

(3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. *Application of the Policy—Other Factors (§ 86.41(c)).* a. *Recruitment of Student Athletes.*[7] The athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

(1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;

(2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and

(3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. *Provision of Support Services.* The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

(1) The amount of administrative assistance provided to men's and women's programs;

(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. *Overall Determination of Compliance.* The Department will base its compliance determination under § 86.41(c) of the regulation upon an examination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or

c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

C. Effective Accommodation of Student Interests and Abilities.

1. *The Regulation.* The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at § 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available—

> Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. *The Policy.* The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

a. The determination of athletic interests and abilities of students;

b. The selection of sports offered; and

c. The levels of competition available including the opportunity for team competition.

3. *Application of the Policy—Determination of Athletic Interests and Abilities.*

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

a. The processes take into account the nationally increasing levels of women's interests and abilities;

b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;

c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. *Application of the Policy—Selection of Sports.*

In the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

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[7] Public undergraduate institutions are also subject to the general anti-discrimination provision at § 86.23 of the regulation, which reads in part:

"A recipient * * * shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action * * * and may choose to undertake such efforts as affirmative action * * *"

Accordingly, institutions subject to § 86.23 are required in all cases to maintain equivalently effective recruitment programs for both sexes and, under § 86.41(c), to provide equivalent benefits, opportunities, and treatment to student athletes of both sexes.

a. Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. *Application of the Policy—Levels of Competition.*

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. *Overall Determination of Compliance.*

The Department will base its compliance determination under § 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole; or

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 86.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964.[8] The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.[9]

According to the regulation, there are two ways in which enforcement is initiated:

- *Compliance Reviews*—Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. (45 CFR 80.7(a))
- *Complaints*—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate.

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[8] Those procedures may be found at 45 CFR 80.6–80.11 and 45 CFR Part 81.

[9] *WEAL* v. *Harris*, Civil Action No. 74–1720 (D. D.C., December 29, 1977).

If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8–80.11 and 45 CFR Part 81.

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 612; and 45 CFR Part 86)

Dated: December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Educction, and Welfare.

Dated: December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A—Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977–78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students).[1] Yet, only 30 percent of the intercollegiate athletes are women.[2]

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.[3]

2. Participation by women in sports is growing rapidly. During the period from 1971–1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000—an increase of over 600 percent.[4] In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent.[5]

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000.[6] During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375.[7] These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from $1.2 to $2.2 million between 1970–1977 alone.[8]

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is $39,000. Male athletes receive $32,000 or 78 percent of this amount, and female athletes receive $7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.[9]

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.[10]

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity."[11] However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B—Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

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[1] *The Condition of Education 1978*, National Center for Education Statistics, p. 112.

[2] Figure obtained from Association for Intercollegiate Athletics for Women (AIAW) member survey, *AIAW Structure Implementation Survey Data Summary*, October 1978, p. 11.

[3] U.S. Commission on Civil Rights, Comments to DHEW on proposed Policy Interpretation; Analysis of data supplied by the National Association of Directors of Collegiate Athletics.

[4] Figures obtained from National Federation of High School Associations (NFHSA) data.

[5] *Digest of Education Statistics 1977–78*, National Center for Education Statistics (1978), Table 40, at 44. Data, by sex, are unavailable for the period from 1971 to 1977; consequently, these figures represent 80 percent of total enrollment for that period. This is the best comparison that could be made based on available data.

[6] Ibid. p. 112.

[7] These figures, which are not precisely comparable to those cited at footnote 2, were obtained from *Sports and Recreational Programs of the Nation's Universities and Colleges*, NCAA Report No. 5, March 1978. It includes figures only from the 722 NCAA member institutions because comparable data was not available from other associations.

[8] Compiled from NCAA *Revenues and Expenses for Intercollegiate Athletic Programs*, 1978.

[9] Figures obtained from *AIAW Structure Implementation Survey Data Summary*, October, 1978, p. 11.

[10] 121 Cong. REc. 29791–96 (1975) (remarks of Senator Williams); Comments by Senator Bayh, Hearings on S. 2106 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 94th Congress, 1st Session 48 (1975); "Survey of Women's Athletic Directors," AIAW Workshop (January 1978).

[11] See April 18, 1978, Opinion of General Counsel, Department of Health, Education, and Welfare, page 1.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentors noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Comment B: Commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: Comment accepted. The statistics have been updated and corrected where necessary.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July 1978, compliance deadline established in § 86.41(d) of the Title IX regulation.

Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentors stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was offered as a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalizes those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard, would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?

Comment: Commentors stated that this question was largely irrelevant because there were so few universities at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumed compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested that including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under § 86.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentors indicated that the factors named in the proposed Policy Interpretion (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition", given the greatly differing competitive structure of men's and women's programs. Other commentors were concerned that the "scope of competition" factor that may currently be designated as "non-discriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditures has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No 7: Is the comparability standard for benefits and opportunities that are not financially measurably fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentors stated that the comparability standard was fair and realistic. Some commentors were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

Comment: Several commentors indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

Additional Comments

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentors.

(1) *Comment:* Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate non-discriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, non-discriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) *Comment:* Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly defined.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) *Comment:* Many commentors were concerned that the proposed Policy Interpretation neglected the rights of individuals.

Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's programs and within men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women, were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.

(4) *Comment:* Several commentors stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) *Comment:* Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to § 86.6(c) of the Title IX regulation, which reads in part:

> "The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * *"

Since the penalties for violation of intercollegiate athletic association rules can have a severe effect on the athletic opportunities within an affected program, the Department has re-examined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) *Comment:* Some commentors suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) *Comment:* Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: There are two problems with this approach to assessing equal opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

Second, no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

(8) *Comment:* Some commenters suggest that equality of opportunity should be measured by a "sport-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women (e.g., football, ice hockey). In addition, the sport-specific concept overlooks two key elements of the Title IX regulation.

First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)). As implied above, Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.

(9) *Comment:* A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intecollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus.

This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

(a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;

(b) The Department would determine whether the plan satisfies the interests of the involved parties; and

(c) The Department would determine whether the institution is adhering to the plan.

These commenters felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an anti-discrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its reponsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.

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